



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 433

W. D. LYONS, PETITIONER,

vs.

THE STATE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE CRIMINAL COURT OF APPEALS OF
THE STATE OF OKLAHOMA

INDEX

	Original	Print
Proceedings in Criminal Court of Appeals of Oklahoma	"A"	1
Docket entries	"A"	1
Petition in error	1	2
Case-made from District Court of Choctaw County	5	4
Caption and appearances	5	
Information	9	4
Notice of proof of alibi	13	7
Arraignment	14	8
Order passing hearing	14	8
Plea of not guilty	15	8
Statement of evidence	15	9
Caption and appearances	15	9
Motion to Quash Information	16	9
Opening Statement by the State	17	10
State's Testimony in Chief	23	15
James Glenn Rogers	23	15
Cross Examination	28	
G. C. Campbell	29	
L. B. Mills	39	
Sammie Green	51	
Mrs. W. A. Hall	59	

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INDEX

Case-made from District Court of Choctaw County—Continued

State's Testimony in Chief—Continued	Original	Print
Hosea Walker.....(omitted in printing)	82	
Richard Scott.....(omitted in printing)	87	
Lonzo Brown.....(omitted in printing)	72	
Alton Ryder.....(omitted in printing)	76	
Dr. F. L. Waters.....(omitted in printing)	82	
H. H. Wallace.....	88	18
Cross Examination.....	92	22
W. A. Hall.....(omitted in printing)	93	
Dr. F. L. Waters [recalled].....(omitted in printing)	97	
Curtis Thompson.....(omitted in printing)	99	
Jess Dunn.....	103	23
Dr. E. A. Johnson.....(omitted in printing)	107	
Proceedings in absence of the jury.....	111	26
W. D. Lyons.....	111	26
Cross Examination.....	148	54
Re-direct Examination.....	152	57
Roy Harmon.....	153	58
Cross Examination.....	156	60
Re-direct Examination.....	163	66
Re-cross Examination.....	163	66
Floyd Brown.....	166	68
Cross Examination.....	167	69
Harvey Hawkins.....	173	73
Cross Examination.....	174	74
Re-direct Examination.....	177	77
Re-cross Examination.....	179	78
Re-direct Examination.....	180	79
Re-cross Examination.....	181	80
Van Raulston.....	182	81
Cross Examination.....	183	81
Re-direct Examination.....	185	83
Roy Marshall.....	186	83
Cross Examination.....	187	85
Re-direct Examination.....	188	85
Annie May Fleeks.....	190	87
Cross Examination.....	192	89
Ruling of the Court as to admissibility of confessions.....	193	89
State's testimony in chief (continued).....	194	90
Jess Dunn.....	194	90
State's exhibit 9—Statement and confession of W. D. Lyons, Jan. 23, 1940.....	197	92
Cross examination.....	210	102
Re-direct examination.....	222	111
Re-cross examination.....	222	112
Van Raulston.....	223	113
Cross Examination.....	224	113
Re-direct Examination.....	228	116
Re-cross Examination.....	228	117
Re-direct Examination.....	229	118

Case-made from District Court of Choctaw County—Continued

State's Testimony in Chief—Continued

	Original	Print
Roy Marshall.....	230	118
Cross Examination.....	232	120
Re-direct Examination.....	233	121
Re-cross Examination.....	233	121
Re-direct Examination.....	236	123
Re-cross Examination.....	236	123
Re-direct Examination.....	237	123
Re-cross Examination.....	237	124
Cap Duncan.....	237	124
Cross Examination.....	239	125
Bus Fleeks..... (omitted in printing)	240	
Henryetta Butler..... (omitted in printing)	241	
Ella May Fleeks..... (omitted in printing)	244	
Reasor Cain.....	246	126
Cross Examination.....	246	128
Howard Rorie.....	255	134
Cross Examination.....	257	135
Ennis Aiken.....	260	137
Bird Collins.....	262	139
Harvey Hawkins.....	263	140
Cross Examination.....	271	146
Boy Marshall, Re-Cross Examination.....	277	151
Floyd Brown.....	278	151
Cross Examination.....	284	156
Roy Deering.....	293	163
Cross Examination.....	296	165
Roy Harmon.....	297	167
Cross Examination.....	300	169
Vernon Cheatwood.....	308	175
Cross Examination.....	311	177
Re-direct Examination.....	325	189
C. C. Crabb..... (omitted in printing)	327	
The State rests.....	333	190
Defendant's motion for directed verdict.....	334	190
Defendant's opening statement.....	334	190
Defendant's testimony in chief.....	340	195
Clarence Keys.....	340	195
Cross Examination.....	344	198
Re-direct Examination.....	349	202
Clarence Horn.....	350	202
Cross Examination.....	352	204
W. D. Lyons.....	353	205
Cross Examination.....	380	226
Ella May Fleeks.....	408	247
Cross Examination.....	410	248
Christine James.....	410	248
Mrs. Vernon Colclasure.....	411	249
Vernon Cheatwood, Re-cross Examination.....	415	252
Albany Gipson.....	420	256

Case-made from District Court of Choctaw County—Continued

Defendant's testimony in chief—Continued	Original	Print
Leslie Skeen.....	421	257
Mrs. Vernon Colclasure (recalled).....	424	259
E. O. Colclasure.....	425	260
The Defendant Rests.....	428	262
State's Rebuttal Testimony.....	428	262
Lester Merritt.....	428	262
The State Closes.....	429	263
The Defendant Closes.....	429	263
Defendant's motion for directed verdict.....	430	263
Defendant's Requested Instructions.....	430	264
Instructions by the Court.....	432	265
Verdict.....	442	272
Journal Entry of trial.....	443	273
Motion for New Trial.....	447	275
Order overruling motion for new trial.....	450	277
Judgment and Sentence.....	451	278
Order Fixing Time for case-made on appeal.....	454	280
Notice of Appeal.....	455	280
Notice of Appeal.....	456	281
Order Extending Time.....	457	281
Recital as to case-made.....	458	282
Service of case-made.....	459	282
Stipulation as to record.....	460	283
Certificate of Trial Judge.....	461	284
Brief of Plaintiff in Error and Acknowledgment of Service (omitted in printing).....	462	
Brief of American Civil Liberties Union as Amicus Curiae (omitted in printing).....	523	
Motion of County Attorney for Permission to File additional Brief and Affidavit of Service (omitted in printing).....	533	
Brief of Defendant in Error and Affidavit of Mailing (omitted in printing).....	534	
Opinion, Barefoot, J.....	556	284
Order granting additional time within which to file petition for rehearing.....	642	337
Petition for rehearing.....	643	338
Order denying petition for rehearing.....	658	346
Dissenting opinion, Doyle, J., on petition for rehearing.....	659	346
Clerk's certificate..... (omitted in printing)	670	
Order granting motion for leave to proceed in forma pauperis.....	671	355
Order allowing certiorari.....	672	355
Stipulation as to issue involved and record necessary for con- sideration thereof.....	673	355

[fol. a]

**IN CRIMINAL COURT OF APPEALS OF THE STATE
OF OKLAHOMA**

No. 10,108

W. D. LYONS, Plaintiff in Error,

vs.

STATE OF OKLAHOMA, Defendant in Error

DOCKET ENTRIES

Date 1941

July 23. Check on Liberty National Bank, Oklahoma City, Oklahoma, J. J. Bruce. 15.00.

July 23. To filing and entering Petition in Error and Case-Made.

July 23. Issue Certificate of Appeal.

Sept. 11, J. E. Barefoot, P. J., Plaintiff is granted ten days from Sept. 21 to file brief.

Oct. 11. Brief of Plaintiff and Acknowledgement of Service. Leave to file, Barefoot, P. J.

Nov. 21., Brief of Amicus Curiae.

Mar. 4, 1942, J. E. Orally argued and submitted on records and briefs.

April 23. Motion for Permission to file brief and Affidavit of Service.

July 10. Brief of Defendant in Error and Affidavit of Mailing Service.

[fol. b] June 2, 1943, J. E. Opinion affirmed, Barefoot, J.

June 2, 1943, J. E. Copy to Stanley D. Beldon and Atty. Gen.

June 2, 1943, J. E. Court Minute, Affirmed, Barefoot, J.

June 4, 1943, J. E. Court Minute, Original Opinion withdrawn, corrected and refiled by Barefoot, J.

June 4, 1943.—Original Opinion withdrawn, corrected and refiled as per above order.

June 11, J. E. Order, Jones, J., Plaintiff granted ten days additional time to file Petition for Rehearing. Copy to Attorneys.

June 26. Petition for Rehearing.

July 21, J. E. Court Minute, Petition for Rehearing denied, Barefoot, J.

July 21, J. E. Certified copy of above court minute mailed to Stanley Belden.

Aug. 5. Mandate Issued.

Aug. 9. Receipt for mandate.

Aug. 15, J. E. Opinion, Dissenting, Doyle, J.

Aug. 18, J. E. Copy to Stanley D. Belden and Attorney Gen.

Aug. 18, J. E. Court Minute, Doyle, J., Opinion, Dissenting, Doyle, J.

[fol. 1] IN THE CRIMINAL COURT OF APPEALS OF OKLAHOMA

A-16108

W. D. LYONS, Plaintiff in Error.

vs.

STATE OF OKLAHOMA, Defendant in Error.

PETITION IN ERROR—Filed July 23, 1941

Comes now W. D. Lyons, plaintiff in error, (hereinafter called the defendant), and complains of the state of Oklahoma, defendant in error, (hereinafter called the plaintiff) and to this court alleges, represents and states:—

That heretofore on the 31st day of January, 1941, the said State of Oklahoma, in a cause then pending before the District Court of Choctaw County, obtained a verdict upon which a judgment was rendered sentencing W. D. Lyons, the defendant to life imprisonment, for the crime of murder. That in said verdict and judgment material and prejudicial errors were committed in violation of the defendant's statutory and constitutional rights which resulted in serious miscarriage of justice as will more fully appear in the original case made hereto attached, Marked exhibit "A" and made a part of this Petition in Error. Defendant in Error alleges that there is material error in the judgment, verdict and rulings of the Court, all of which affect the substantial rights of the defendant at the following particulars to wit:—

[fol. 2]. 1. The Court below committed error in that it overruled the motion interposed to the information by the defendant, which assigned as grounds that the said complaint is null and void there having been no proper founda-

tion laid for its issuance and for the further reason the defendant was not properly before the Court, that said court was without jurisdiction of the person of the defendant, no proper warrant having been issued and served upon said defendant as is required by law.

That the Court below committed error in that it permitted the introduction of the purported second confession, obtained at the penitentiary, the same having been obtained the same day as the first confession (which said first confession was ruled out by the Court, the same having been obtained through force and violence) and while still in great physical pain, mental agony and fear as a result of the long hours of torture endured by the defendant when the first confession was obtained and the defendant still being under the control and influence of the officers and in their power made the second confession only after suffering additional hours of torture at the hands of the officers. All of which were a denial of the defendant's statutory and constitutional rights, the confession not being a free and voluntary confession and being product of the same fear which produced the first confession, and therefore not admissible as it was in violation of the Constitution and Bill of Rights of the State of Oklahoma, and of the due process clause [fol 3] of the 14th Amendment to the Constitution of the United States.

That the Court below committed error in that it permitted evidence to be introduced which was obtained by and contained in the first confession, which confession was held to be inadmissible by the Court.

That the Court below committed error in overruling defendant's motion for a directed verdict.

The court below committed error in overruling the demurrer to the State's evidence interposed by the defendant.

The court below committed error in failing to set aside the verdict of the jury, on the ground that it was not supported by lawful evidence.

The Court below committed error in overruling defendant's motion for a new trial which assigned as reason therefor errors committed by the Court in overruling the defendant's motion to quash the information, there having been no proper foundation laid for its issuance. That the Court committed error in overruling defendant's objection to the testimony and in admitting testimony over the ob-

jections; which evidence was not admissible and violated the Fourteenth Amendment to the Constitution of the United States in depriving the defendant of due process of law and equal protection. That the Court committed error in refusing to give defendants instructions numbered one and two.

[fol. 4] Wherefore defendant in error prays that said verdict and judgment of the Court so rendered may be reversed, set aside, and held for naught and for such other relief as to the Court seems just.

Stanley H. Belden, Thurgood Marshall, Attorneys
for Plaintiff in Error.

[File endorsement omitted.]

[fols. 5-8] IN DISTRICT COURT OF CHOCTAW COUNTY

Case-Made

[Caption and appearances omitted.]

[fol. 9] IN THE DISTRICT COURT OF CHOCTAW COUNTY,
OKLAHOMA

THE STATE OF OKLAHOMA

VS.

True Name: W. D. LYONS, W. D. LYONS, Alias W. D. GARDNER, Alias W. D. FLECKS, and VAN BIZZELL, Defendant

INFORMATION—Filed August 29, 1940

In the Name and by the Authority of the State of Oklahoma:

Now comes Norman Horton, the duly qualified and acting County Attorney in and for Choctaw County, State of Oklahoma, and gives the District Court of Choctaw County, State of Oklahoma, to know and be informed that W. D. Lyons, alias W. D. Gardener, alias W. D. Fleeks, and Van Bizzell did in Choctaw, State of Oklahoma; on or about the 31 day of December 1939 and anterior to the presentment hereof, commit the crime of Murder in the manner and

form as follows, towit: that the said defendants then and there being did then and there while acting together and conjointly with a common purpose, wilfully, wrongfully, [fol. 10] intentionally, unlawfully and feloniously, without justifiable or excusable cause and without authority of law, and with a premeditated design to effect the death of one Elmer Rogers, make an assault in and upon the person of the said Elmer Rogers, with certain deadly and dangerous weapons, to-wit: a single barrel shot gun, a double bit ax, and by burning; that is to say that the said defendants with the said weapons then and there had and held in the hands of them the said defendants, did then and there shoot at and shoot the said Elmer Rogers then and there discharging from said shotgun certain leaden shot at, upon and into the body of the said Elmer Rogers with the felonious intent to kill and murder the said Elmer Rogers, and did thereafter with the said ax then and there had and held in the hands of them the said defendants as aforesaid chop, beat and crush the head and body of the said Elmer Rogers, then there and thereby inflicting certain mortal wounds upon the said Elmer Rogers; and that after inflicting said wounds upon the said Elmer Rogers as aforesaid the said defendants did then and there set fire to the dwelling house of the said Elmer Rogers in which he was then and there residing at the time and in which his mortally wounded body lay upon the floor of said dwelling with the felonious intent to destroy said body of Elmer Rogers which said defendants had assaulted in the manner aforesaid with the felonious intent upon the part of said defendants to kill and murder the said Elmer Rogers and from which said mortal wounds the said Elmer Rogers died then and there as intended by the said defendants, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State.

Norman Horton, County Attorney, by Robt. L. Gee,
Jr., Assistant County Attorney.

[fol. 11] *Names of Witnesses:*

Henryetta Butler, Ft. Towson.

Rosie Fleeks, Ft. Towson.

Allit A. Fleeks, Ft. Towson.

Curtis Thompson, Ft. Towson.

Alonzo Brown (Hampton), Ft. Towson.

Names of Witnesses—Continued

Sammie Green (Bray), Ft. Towson.
Hopson Childs, Ft. Towson.
Hosea Walker, Ft. Towson.
Aubrey Brown, Ft. Towson.
Buster Fleeks, Ft. Towson.
Alton Rider, Ft. Towson.
Roy Harris, Ft. Towson.
L. B. Meals, Ft. Towson.
Verron Colclasure, Ft. Towson.
Lester Merriot, Ft. Towson.
Clarence Keys, Ft. Towson.
Henry Colbert, Ft. Towson.
Bob Gilliam, Ft. Towson.
Steve Brooks, Ft. Towson.
Lige Williams, Ft. Towson.
George Dickson, Ft. Towson.
Bird Collins, Ft. Towson.
W. A. Hall, Ft. Towson.
James Glenn Rogers, Ft. Towson.
Clarence Weekly, Ft. Towson.
Zeb Kellum, Ft. Towson.
One arm Henry, Ft. Towson.
Mrs. Larry, Ft. Towson.
Cliff Glover, Ft. Towson.
Elmer Rooker, Ft. Towson.
W. D. Stokes, Ft. Towson.
Gene Golden, Ft. Towson.
Matt Freeman, Ft. Towson.
Roy Harmon, Hugo.
Van Raulston, Hugo.
Floyd Brown, Hugo.
Howard Rorie, Hugo.
Reasor Cain, Hugo.
Oscar Bearden, Hugo.
Leonard Holmes, Hugo.
Jess Faulkner, Hugo.
Harvey Hawkins, Hugo.
Roy Marshall, Hugo.
Lawton Cooper, Valliant, Okla.
Cude Campbell, Hugo, Okla.
Jess Dunn, McAlester.
Rosie Ryder, Hugo.
Dr. E. A. Johnson, Hugo.

Names of Witnesses—Continued

Vernie Cheatwood, Okla. City.
 C. C. Crabbe Bureau Cr. Id, Okla. City.
 Dr. F. L. Waters, Hugo, Okla.
 Roy Deering, Ft. Towson.
 Bill Ervin, Ft. Towson.
 Cap Duncan, Hugo, Okla.
 Leonard Holmes, Hugo, Okla.
 Bill Pebsworth, Boswell, Okla.
 [fol. 12] J. E. Williams, Okla. City, Okla.
 L. L. McKenzie, Pawhuska, Okla.
 I. R. Pryor, Fort Smith, Ark
 Dora Scott, Ft. Towson.
 Richard Scott, Ft. Towson.
 Ennis Aikens, Hugo, Okla.
 Annie Butler, Ft. Towson.
 Mrs. W. A. Hall, Ft. Towson.

[File endorsement omitted.]

[fol. 13] IN THE DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted]

NOTICE OF PROOF OF ALIBI—Filed December 5, 1940

Comes now W. D. Lyons, by his attorney of record, Stanley D. Belden, and gives notice to Norman Horton, County Attorney of Choctaw County, Oklahoma, that said defendant intends to prove an alibi in the above entitled cause and show that he was not at the scene of the alleged crime at any time, but was in and about the town of Ft. Towson at such time.

Stanley D. Belden, Attorney for Defendant.

I, Norman Horton, County Attorney of Choctaw County, Oklahoma, do hereby acknowledge service of notice of proof of alibi in the above entitled cause.

Norman Horton, County Attorney, by Robt. L. Gee, Jr.

[fol. 14] IN DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted].

ARRAIGNMENT—December 30, 1940

County Attorney permitted to add names of additional witnesses and amend information to speak correct date.

W. D. Lyons, in open court, upon arraignment, says his true name is W. D. Lyons, hears the reading of the information by Norman Horton, County Attorney, asks for and is granted 24 hours in which to plead, said time being extended to January 6, 1941. The defendant, W. D. Lyons, is served with a copy of the information with the names and postoffice addresses of witnesses in chief to be used in the prosecution against him endorsed thereon.

The County Attorney is authorized and directed to notify attorney for defense of date for defendant to plead.

IN DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted]

ORDER PASSING HEARING—January 6, 1941

Cause passed to January 13, 1941. County Attorney granted permission to add to information the name of Dr. F. L. Waters, as a witness, same to be served on Defense Attorney.

[fol. 15] IN DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted]

PLEA OF NOT GUILTY—January 13, 1941

W. D. Lyons, in open court, enters his plea of not guilty to the charge of murder. County Attorney permitted to endorse the following names on original information, to-wit: Fay Deering, Bill Ervin, Leonard Holmes, Bill Pebsworth, J. E. Williams, L. L. McKenzie, J. R. Pryor, Lawton Cooper, and Cude Campbell.

IN DISTRICT COURT OF CHOCTAW COUNTY

Statement of Evidence

Thereafter and Thereupon: To-wit, on the 27th day of January, 1941, this cause came regularly on for trial of the defendant W. D. Lyons, severance having been granted herein, and the State of Oklahoma appearing by Norman Horton, County Attorney, and Sam H. Lattimore, Assistant Attorney General, announced ready for trial. The defendant appearing in his own proper person, and by his attorneys, Stanley D. Belden and Thurgood Marshall, was granted permission of the Court to withdraw his plea for the purpose of filing his motion to quash the information. Thereupon the defendant filed in open court his motion to quash the information, which said instrument now appears in the records hereof in words and figures as follows, to-wit:

[fol. 16] IN DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted]

MOTION TO QUASH INFORMATION—Filed January 27, 1941

Comes now W. D. Lyons and moves the court to quash the information filed in the above entitled cause for the reason that said complaint is null and void there having been no proper foundations laid for its issuance and for the further reason that defendant is not now properly before this court and that said court is without jurisdiction of the person of the defendant, no proper warrant having been issued and served upon said defendant as is required by *law* and, therefore, asks that said case be dismissed.

W. D. Lyons, by Stanley D. Belden, Attorney for Defendant.

[File endorsement omitted.]

And thereupon, said motion having been presented to the Court, and the Court being well and sufficiently advised in the premises, overruled said motion to quash, and defendant's exception to such ruling of the Court allowed.

Whereupon the defendant re-entered his plea of not guilty and announced ready for trial, a jury is drawn, impaneled

and sworn to try the cause, all witnesses were called, sworn, and put under the rule, and proceedings were had and testimony adduced as follows, to-wit:

[fol. 17] By Mr. Horton: If the Court, please, I should like to strike out these aliases. He said his true name is W. D. Lyons.

By the Court; He said his true name is W. D. Lyons and he should be prosecuted as W. D. Lyons.

OPENING STATEMENT BY THE STATE

By Mr. Horton; Gentlemen of the Jury: The information in this case reads as follows: "The State of Oklahoma vs. W. D. Lyons and Van Bizzell. In the District Court of Choctaw County, Oklahoma. In the name and by the authority of the State of Oklahoma. Now comes Norman Horton, the duly qualified and acting County Attorney in and for Choctaw County, State of Oklahoma, and gives the District Court of Choctaw County, State of Oklahoma, to know and be informed that W. D. Lyons and Van Bizzell did in Choctaw County, State of Oklahoma, on or about the 31st day of December, 1939, and anterior to the presentment hereof, commit the crime of murder in the manner and form as follows, to-wit: That the said defendants then and there being did then and there while acting together and conjointly with a common purpose, wilfully, wrongfully, intentionally, unlawfully and feloniously, without justifiable or excusable cause and without authority of law, and with a premeditated design to effect the death of one Elmer Rogers, make an assault in and upon the person of the said Elmer Rogers with a certain deadly and dangerous weapons, to-wit: a single barrel shot gun, a double bit ax, and by burning; that is to say that the said defendants with the said weapons then and there had and held in the hands of them the said defendants, did then and there shoot at and shoot the said Elmer Rogers then and there discharging from said shot gun certain leaden shot at, upon and into the body of the said Elmer Rogers with the felonious intent to kill and murder the said Elmer Rogers, and did thereafter with the said ax then and there had and held in the [fol. 18] hands of them the said defendants as aforesaid chop, beat and crush the head and body of the said Elmer Rogers, then there and thereby inflicting certain mortal wounds upon the said Elmer Rogers; and that after inflict-

ing said wounds upon the said Elmer Rogers as aforesaid the said defendants did then and there set fire to the dwelling house of the said Elmer Rogers in which he was then and there residing at the time and in which his mortally wounded body lay upon the floor of said dwelling with the ~~feloneous intent to destroy said body of Elmer Rogers~~ which said defendants had assaulted in the manner aforesaid with the felonious intent upon the part of said defendant to kill and murder the said Elmer Rogers and from which said mortal wounds the said Elmer Rogers died then and there as intended by the said defendant, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State. (Signed) Norman Horton, County Attorney, by Robt. L. Gee, Jr., Assistant County Attorney." To which information the defendant has entered his plea of not guilty. Now, Gentlemen of the Jury, the proof in this case will show that Elmer Rogers and his wife and three small children, James Glenn Rogers, Elvie Dean Rogers, and Billie Don Rogers, lived right west of Fort Towson, may be a little to the north, between a half and three quarters of a mile, and that they lived in a sort of solitary pasture, the only near-by neighbors being Mr. Roy Deering, who lived back northwest, and Ed Speers, who lived some two or three hundred yards to the east. That they were at home on this night of December 31st, New Year's Eve, all there in the evening. They were poor people; that they lived in a simple, rather dilapidated house of three rooms and rather tumbled down. They had little furniture, practically nothing but beds and stove and kitchen furniture; in fact they were short on chairs. [fol. 19] They had to sit on the floor, some of them or on the beds. They were sitting there on this evening, after supper time, in the light of a kerosene lamp, without any window shades, apparently, when this awful tragedy occurred. The little boy, the oldest boy, about seven or eight years old, James Glenn Rogers, when his father was shot, and his mother was shot and killed in the back yard, and his other little brother, Elvie Dean, was lying sound asleep in the east room, managed to take his baby brother, Billie Don, a small baby, in his arms and make an escape by going down the road, a winding lane through the pasture, about a quarter of a mile to the gate and to the highway. He tugged the little brother down there

in his arms and waited on the highway until a man came along in a car and picked him up and took him to Fort Towson, about a mile, according to the road, almost a mile, east. Now going back behind the scene of this crime, the proof will show that this defendant, that day, had a shot gun; that he was carrying that shot gun around in the vicinity of the Rogers' home, and more in the immediate vicinity of what is known as Colored Quarters in the northwest part of Fort Towson, near the sawmill, almost due east of the Elmer Rogers' house. That he went to a colored man's house, Bus Fleeks, that day. That he either took this shot gun over there, or it was brought to him by Sammie Green. Sammie Green loaned him that shot gun. He left it down at Bus Fleek's house, and proceeded with other colored boys to drink some cat whiskey. That they consumed various amounts of that cat whiskey through the day. That afternoon, some time during that day, and all during the day, they trailed back and forth from the Bus Fleeks' house to a bois d'arc thicket north and west of the Bus Fleeks' house, near the Holiness Church, and that they hid some whiskey out in that thicket. That W. D. Lyons became intoxicated to a noticeable degree. That later on in the evening he [fol. 20] was seen carrying his shot gun around wrapped up in a newspaper, and that just about sun down and shortly prior to this awful tragedy occurred, sometime between seven and eight o'clock on that day, he was seen with that gun put together, breeched. The testimony will show that he was later apprehended about two weeks after this crime had been committed. That he made a confession in the presence of the officers. That the body of Elmer Rogers, after having been shot, had been chopped with an ax. The investigation had failed to reveal the whereabouts of that ax. The investigation, scouring all parts of the county, had failed to reveal the whereabouts of any shot gun shells. And that after this defendant, W. D. Lyons, was questioned for long hours about this transaction, he finally admitted that he and Van Bizzell killed those people, mutilated their bodies, and set fire to the house, and that in substantiation of that confession, the officers took him to the scene of the tragedy. He told them where he had put the ax when he finished the awful crime. He told them he threw it under the east window of the house. When they took him out to

the scene, after making some calculations as to his whereabouts on that fatal evening, he showed them where the ax was, and there it was. After some digging, they found it was several inches beneath the surface of the ashes and lay impact in the frozen ashes just where he said he had thrown it, approximately. The proof will show that all during this time, and the weeks that followed, the weather was severe, freezing most of the time, snow fell on one or two different occasions, and that on the night of the tragedy the charred bodies lay on the spot that was once their home, still smoking and steaming from that terrible inferno, and in order for the undertaker, who was there with an ambulance, to be able to put any of those bodies in the ambulance and take them to town, water was poured on them to cool them off. The body of Elmer Rogers was lying in the east room, and very near the place where the ax was found, and over which a great deal of water was poured. The body of Mrs. Rogers was lying on what [fol. 21] had been the back porch, near the kitchen. It had a shed room kitchen with a porch on the west. The other room was on the west. There was no fire place and they didn't use it much. It was a two room house with a shed room kitchen and a porch. After this defendant went to the place where the ax was found, he then took the officers to the place where he said, in his confession, that he had thrown down the empty shot gun shells. He said in his confession that he bought a quarter's worth of shot gun shells at Fort Towson, at the store of Mr. Bill Hall, W. A. Hall; that he bought 12-gauge, No. 4 shot, and that they were red shells. South of the Elmer Rogers house, running east and west, there are about three fences, three fence rows. In his confession, he said those shells were somewhere along the second fence row, between two trees. It is a kind of bald prairie, bare, and a very few trees in the pasture. The officers went down the fence to where there were two trees, and in between these trees were found the shot gun shells. He said that after he had committed this awful crime, that they ran, that he and Van Bizzell ran southeast, towards the railroad track. The proof will show that W. D. Lyons, at that time, was staying with his grandmother, who lived on the east side of Fort Towson, near the lime-kiln hill, across town from where Elmer Rogers lived; that Van Bizzell lived toward the River Road, the first road that intersects the highway

to the west. According to his statement, he and Van Bizzell ran down the first fence about a hundred yards to the east, and then down towards the railroad track, across a fence, then another, and the last fence, along the highway, a quarter of a mile or so, to the southeast, across the highway, went on down the railroad nearly to the river road and separated. Van Bizzell went on south and W. D. Lyons went to his grand-mother's house, at the lime kiln hill, east of Fort Towson, and back north, where she [fol. 22] lived. The proof will show that on the night of the crime, he came home to his mother's house about eight, or eight thirty, and that he brought in this gun, and the proof will show that is where it was found. The proof will show that on the night he was arrested, he tried to escape, he attempted to flee, that he was apprehensive; that his course of conduct was such that it aroused the suspicions of his family and the officers. We have here witnesses who will tell us about the ax, identify that ax as being the ax of Elmer Rogers. We have witnesses who will tell us about those shells, identify those as being the shells that were shot from the gun that W. D. Lyons borrowed from Sammie Green. The proof will show that the little boy, Glenn Rogers, identified the killers and murderers of his father, and mother, and little brother, as being negroes. Proof will show from all the facts and circumstances that it was a brutal crime, motivated by drinkers, angry drinkers, to rob, a desire for liquor, and that these defendants went there, in that solitary pasture, to that lonely home, with murder, arson, in their hearts. That they, after killing the people, ransacked the house, took some money from the dresser drawer, smeared and scoured the place with coal oil and set it afire, leaving the bodies to die, and little Elvie Dean Rogers, asleep to burn alive. Upon making that proof, Gentlemen of the Jury, on substantiating and corroborating the written confession, and the admissions of this defendant, with those undisputable circumstances, with that net that closes him and fixes him to the crime beyond any doubt, and further substantiating by days later, after he had made his first confession, and after he had made another confession in a casual conversation with Cap Duncan, he said again, "Me and Van Bizzell killed them people." Upon making that proof, will be entitled to a verdict of guilty at your hands. And further, on making that proof we will ask

you to send this defendant to the electric chair, where we [fol. 23] feel that the pe-petrator of such a hideous and diabolical crime should end his life. I thank you.

By the Court: Does the defense desire to reserve their statement?

By Mr. Belden: The defendant desires to reserve his statement at this time.

By the Court: Call the State's first witness.

JAMES GLENN ROGERS, in behalf of the State of Oklahoma, in chief, after being duly sworn, testified as follows, to-wit:

By the Court: Let the record show that Vernon Cheatwood, a State officer and an investigator out of the State office is excused from the rule.

By Mr. Belden: Did you say he is excused from the rule?

By the Court: Yes, he is excused, being a State officer, and the investigator out of the Governor's office.

By Mr. Belden: We would like an exception to that.

By the Court: Show their exception.

By Mr. Horton:

Q. Your name is James Glenn Rogers?

A. Yes sir.

Q. How old are you, Glenn?

A. Eight.

Q. Eight years old. Where do you live now?

A. Berwyn.

Q. Did you ever live down here in Choctaw County, close to Fort Towson?

[fol. 24] A. No.

Q. Do you remember when your mother and father got killed?

A. Last year.

Q. Do you know where you were living then? When they were killed?

A. Fort Towson.

Q. Fort Towson? Were you at home on that night?

A. Yes sir.

Q. How did your father get killed?

A. He was standing, pulling off his clothes, fixing to go to bed, and the shot came and he fell on the next bed, between there, and fell down.

- Q. Where did the shot come from?
- A. Through the window on the side of the house.
- Q. Was your mother in the room then?
- A. Yes sir.
- Q. What did she do?
- A. She called for help.
- Q. Did she run out of the house?
- Q. Yes, said for me to go to the baby, and I heard a shot.
- Q. Was Elvie Dean in the house?
- A. He was in bed.
- Q. He was in the bed asleep?
- A. No, he had just got in.
- Q. Was Billie Don in the house?
- A. Yes. I was holding him.
- Q. Where did your mother go? Did she run out at the back door, or the front door?
- A. She went out of the front door.
- Q. Did she go back to where the well was?
- A. I think she did.
- Q. In the back yard?
- [fol. 25] A. Yes sir.
- Q. Is she dead now?
- A. Yes sir.
- Do you know how she got killed?
- A. With a gun.
- Q. Did you hear the gun fire?
- A. Yes sir.
- Q. Where was she when you heard the gun shot?
- A. It was back of the house, by the well.
- Q. And that was after your father had got shot by the window?
- A. Yes sir.
- Q. Then what happened, James Glenn?
- A. I jumped in the bed and somebody came in.
- Q. Was the lamp light shining?
- A. Yes.
- Q. And somebody came in the house?
- A. Yes, and blowed it out.
- Q. Who was it that came into the house, if you know?
- A. I saw him walk in the house.
- Q. What kind of looking person was he?
- A. I didn't, I couldn't tell.
- Q. Was he a white man, or a black man?

A. I don't know.

Q. Did you see him start the fire?

A. No, ma'am.

Q. Did you see him put the light out?

A. Yes.

By Mr. Belden: If the Court please, we are going to ask him not to lead the witness all the way.

By the Court: The Court will allow you to lead the witness to some extent, but don't lead the witness any more [fol. 26] than you can help. He is of a very tender age, and it will be necessary to lead him some.

Q. James, you just tell the Court what happened after the blew the light out.

A. Well, he blew the light out, and it sounded like he put on some clothes. He went out and set the side of the door afire, then I saw a black hand.

Q. Saw a hand?

A. A black hand, and then the house was—it was light enough, I could see them go out again. I got the baby and ran off.

Q. Where did you go?

A. Down to the highway.

Q. What did you do when you got there?

A. I caught a ride.

Q. Where was your four year old brother when you left, Elvie Dean?

A. He was still in bed.

Q. He was still in bed?

A. Yes sir.

Q. What was Elvie Dean doing?

A. He was just laying in bed. I think he was already gone to sleep.

Q. Already gone to sleep?

A. Yes sir.

Q. Who are you living with now?

A. Buddie Colclasure.

Cross-examination.

By Mr. Belden:

Q. James, how close to either of these men were you?

A. I don't know.

Q. Just about how close? Will you tell me that, James?
[fols. 27-86] A. About six inches.

Q. Do you understand how far six inches is? Will you measure it and show how far you think six inches is?

A. About that long.

Q. You think they were that close to you? Do you think James, that was one of them or both of them?

A. One. That blowed out the lamp.

Q. They came into the room where you were, and you think he was about that far from you, is that right?

A. Yes sir.

Q. And the light, was it still burning when he came in?

A. Yes, and he blowed it out.

Q. Did you see him before he came into the room?

A. Yes sir.

Q. Where were you?

A. But I didn't look. Yes, because I didn't look what color he was.

Q. Have the officers talked to you about this case a great many times?

A. I think just twice.

Witness Excused.

[fol. 87] By Mr. Horton: If the Court please, Dr. Johnson is sick in bed and not able to be here, and in his absence, we would like to read the testimony he made and gave in the preliminary trial.

By the Court: Do you have a transcript of that testimony.

By Mr. Horton: Yes sir. We will have the stenographer [fol. 88] called and use him on the testimony that Dr. Johnson gave.

By the Court: All right. You may do so.

H. H. WALLACE, In behalf of the State of Oklahoma in chief, after being duly sworn on oath, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. Mr. Wallace, I hand you State's Exhibit Seven. What is your occupation?

A. Deputy court clerk and county court stenographer.

Q. How long have you been in that position?

A. About five years.

Q. What are your duties in that connection?

A. The regular duties of a deputy court ex officio, and to report proceedings in county court, and I am also the county judge's stenographer.

Q. Do you take down in shorthand the proceedings in the county court and transcribe them?

A. Yes sir.

Q. What do you do with reference to preliminary trials in felony cases?

A. When I am asked by the court, I take those down in shorthand and later transcribe them.

Q. Take down, word for word, the testimony of witnesses?

A. Yes sir.

Q. Did you do that in the case of the State of Oklahoma vs. W. D. Lyons and Van Bizzell?

A. Yes sir.

[fol. 89]. Q. I hand you State's Exhibit Seven, which appears to be page 12 of the transcript, and ask you to identify that.

A. Yes sir. That is a transcript of the testimony, of what he testified. This is a transcript of the testimony of Dr. Johnson that I took and later transcribed. I took this in the preliminary hearing, and later transcribed it.

Q. Is that a true and correct transcript of his testimony?

A. Yes sir.

Q. Will you read that *the* the jury?

By Mr. Marshall: If the Court please, may we ask a preliminary question before we raise an objection?

By the Court: You may.

By Mr. Marshall:

Q. Mr. Reporter, does the record show whether or not W. D. Lyons was represented by counsel in this hearing from which you are now to read?

A. I think it does show.

By Mr. Horton: Just read the preliminary part.

A. It does state at this particular point whether or not he was represented. I think at the beginning of the proceedings it shows.

Q. You may refresh your recollection by referring to that on page 2.

A. Shall I read the record?

Q. I just asked you whether or not he was represented at that hearing. After reading that, are you in position to testify now whether or not he was represented by counsel at that hearing?

A. No sir, he was not.

By Mr. Marshall: Now, your Honor please, we object to the testimony on several grounds. In the first place, it was taken at a time when Lyons was not represented by [fol. 90] counsel, had no opportunity for cross examination, had no opportunity to consult said witness whose testimony is about to be read. It is fundamental law that the accused on trial is entitled to be confronted by witnesses and counsel have opportunity to cross examine such witnesses, and in addition, there has been no showing whether or not the doctor was under subpoena, and most certainly not a sufficient showing that he isn't available today or some other day while this trial is going on. We also question the record for the reason that the County Attorney has said this case would last more than one or two days, and on the basis of another doctor that he understood that Dr. Johnson has a headache, he hasn't sufficient grounds for reading the testimony of Dr. Johnson taken at a time when the defendant was not represented by counsel and had no opportunity to cross examine him.

By the Court: Counsel is correct when he states that the other doctor is not able to come. That is not sufficient ground to use the transcript of testimony. I think the best showing would be that Dr. Johnson is not available to testify.

By Mr. Horton: Well, I think probably that is right, Judge. As to whether or not the defendant was represented by counsel, we have this to say about that: He was present in person, and he was asked—Mr. Wallace, was the defendant asked at that trial whether he wanted to ask any questions before the examining magistrate?

By Mr. Wallace: Yes, he was. As I remember, in every case, Judge Hunter who was presiding asked if he wanted to question the witnesses.

By Mr. Horton: Was the co-defendant represented by counsel?

By Mr. Wallace: Yes sir.

[fol. 91] By Mr. Horton: At that hearing?

By Mr. Wallace: Yes sir.

By Mr. Horton: Was the defendant asked if he wanted counsel?

By Mr. Wallace: I believe he was.

By Mr. Marshall: If your Honor please, I would not object but it seems to me that the witness has in his hand a record, and this testimony is from his mind as to what he thinks Lyons did, and is completely incompetent, irrelevant and immaterial. He has a record which states what all Lyons said and I suggest that the second page be read.

By Mr. Horton: Before that, let me ask this question: Does this show the complete record, including preliminary announcements by the Court from the bench?

By Mr. Wallace: Yes sir.

By Mr. Horton: Read the record then.

By Mr. Wallace: "The defendants are advised of their rights to have an attorney by the Court. Van Bizzell asked that Robert Warren be appointed his attorney. The Court suggested O. A. Brewer as attorney for W. D. Lyons. Mr. Brewer excused from acting as his attorney by the Court. E. A. Blythe, attorney, is suggested by the Court as attorney for W. D. Lyons but refuses to act and is excused by the Court."

"By the Court: In view of the fact that no attorney is available for W. D. Lyons, it will be necessary to proceed with the case. Robert Warren appointed attorney for Van Bizzell. State of Oklahoma announces ready. The defendant Van Bizzell announces ready. By the Court: Gentlemen, do you want the rule? By Mr. Warren: Yes we do."

"The witnesses are admonished by the Court not to talk to each other or to any one, other than attorneys and the [fol. 92] Court. It is hereby stipulated and agreed by and between Norman Horton, attorney for the State, and Robert Warren, attorney for Van Bizzell, that the evidence and testimony offered in the first case may be used in each of the other cases. Above stipulation also agreed to by W. D. Lyons."

"Where upon complaint in Magistrate Case No. 53 is read to the Court in words and figures as follows: to-wit:"

By Mr. Horton: Is the testimony you have transcribed against Van Bizzell the same testimony as was used in this trial against this defendant?

By Mr. Wallace: Yes sir.

Cross-examination.

By Mr. Belden:

Q. Mr. Wallace, I believe you said you made a complete record of all the testimony of the preliminary hearing?

A. Yes sir.

Q. And you have the complete record of that there in your hands?

A. Yes sir.

Q. I am handing you this instrument and ask you what that is.

A. This is a copy of the testimony taken in the trial of Van Bizzell and W. D. Lyons. I believe it was of the preliminary hearing. A transcript of the testimony was introduced two or three times.

Q. Is that a certified copy?

A. Yes, it is.

Q. Of the complete record made in the preliminary trial?

A. Yes sir.

Q. An exact copy of the original which you have before you?

A. This is not the original that I have. It is a copy, too. I don't have the original before me.

By Mr. Belden: We want this marked for the purpose of identification, as Defendant's Exhibit One. We at this [fols. 93-102] time desire to make Defendant's Exhibit One a part of the record in this case.

By the Court: It may be admitted.

By Mr. Horton: If the Court please, we object to the introduction of the entire transcript in the preliminary trial for the reason that there has been no showing that the testimony of these witnesses is not available in court at this time.

By Mr. Belden: If the Court please, at this time we withdraw the exhibit. It has been identified and we do not ask that it be made a part of the record at this time.

By the Court: You may do so.

By Mr. Horton: According to the facts, they are sufficient to entitle us to use the transcript of testimony of Dr. Johnson, which we state it appears to be, if we are able to show that he is not able to be here.

By the Court: I think you may do that if you make the proper showing. That showing has not yet been made.

Witness excused.

[fol. 103] JESS DUNN: In behalf of the State of Oklahoma in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. What is your name?

A. Jess Dunn.

Q. Where do you live, Mr. Dunn?

A. McAlester.

Q. What is your business, Mr. Dunn?

A. Warden of the Oklahoma State Penitentiary.

Q. Do you recall when the Rogers family was murdered at Fort Towson?

A. I do.

Q. What position did you hold at that time?

[fol. 104] A. Warden of the Oklahoma State Penitentiary.

Q. Do you know W. D. Lyons, the defendant?

A. I do.

Q. When did you see him with reference to that murder?

A. He was brought into the penitentiary and into my office, I don't recall the date, or the time, but he was brought there by the then deputy sheriff.

Q. Do you know who brought him?

A. He was a deputy sheriff and there was a barber that came. I don't remember either one.

Q. Do you remember that it was Van Raulston and Roy Marshall?

A. That is who it was Raulston and Marshall.

Q. Did you talk to the defendant?

A. Yes sir.

Q. At that time?

A. Yes.

Q. Where did that conversation take place?

A. In the penitentiary, in my office.

Q. Who was present?

A. Raulston, Van, the deputy sheriff, and the barber from here, and the chaplain, Seals, chaplain of the penitentiary.

Q. Mark this State's Exhibit Nine. Did you have a stenographer present?

A. Yes.

Q. To take down the conversation?

A. Yes.

Q. Did you question the defendant?

A. Yes.

Q. Did he answer the questions?

A. Yes.

Q. Did the stenographer take it in your presence?
[fol. 105] A. Yes.

Q. At your request?

A. Yes.

Q. Mr. Dunn, I hand you State's Exhibit Nine. Will you identify that?

A. That is the statement that was taken in the office, in my office in the Oklahoma State Penitentiary. This is his signature that he signed, and this is his thumb print, finger and thumb print on this document.

Q. Did he sign that at your request and in your presence?

A. Yes.

Q. Did he place his thumb print on it in your presence?

A. He did.

Q. Was any force used on him?

A. Not one bit on earth.

Q. Was he made any promise?

A. He was not made any promise.

Q. Or threats?

A. No promise or threat. When they came to the penitentiary I told them to bring him in to my office. I had handled this boy before.

By Mr. Belden: We object to what he told them. He may relate the facts but not what he told anyone.

By the Court: I understood him to say he handled him before.

By Mr. Belden: He said he told them.

By the Court: What he told them would not be material.

Q. Did you have him brought to your office?

A. They came to my office after they got to the penitentiary. I asked the boy did he want to make any kind of statement, and he said, "Yes, I'll tell you all about it." [fols. 106-110] I went to questioning him and told the boy, I asked him was he afraid, and asked him was he afraid to talk in there. He said he was not, and he answered every question that I asked him, and I think the boy told the truth, just as it was.

By Mr. Belden: Just a minute, now. We object to that and ask that it be stricken.

By the Court: The warden's opinion is not evidence in the case, Gentlemen. You will not consider it.

By Mr. Horton: At this time, may we offer this exhibit in evidence?

By the Court: It may be.

By Mr. Horton: State again what that is?

By Mr. Belden: Just a moment. Did the Court say that it may be admitted?

By the Court: The statement made by him?

By Mr. Horton: The Court said that it might be admitted.

By Mr. Belden: I didn't think you offered it. We want to object.

By the Court: The Court will hear your objection.

By Mr. Marshall: At this time we want to move that State's Exhibit Nine be not admitted into evidence at this time until the preliminary question is investigated on the statement made by the defendant, through counsel, that this statement, as well as any other that might be introduced, were made only after use of force and violence. We maintain that the statement is not voluntary and for that reason we ask the Court to excuse the jury so that we may go into the question of whether or not it is admissible under the law.

Thereupon: The jury retires under charge of sworn bailiffs of the Court, and are recalled to hear the testimony

of Dr. Johnson in behalf of the State in chief, as follows, to-wit:

[fol. 111] Thereupon: The jury is placed in charge of sworn bailiffs of the Court, and withdrawn from the court room, and proceedings had in the absence of the jury, as follows, to-wit:

By the Court: I believe you have a motion to offer to suppress the purported confession?

By Mr. Belden: Yes sir, that was dictated into the record.

W. D. LYONS, in his own behalf, in the absence of the jury, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Belden:

Q. You are W. D. Lyons, the defendant in this case?

A. Yes sir.

Q. Now, I want you to tell the Court what took place after you were arrested as to whether or not you were threatened.

By Mr. Horton: We object to that as leading.

By the Court: Sustained, don't lead the witness. He may make any statement as to what was done.

By Mr. Belden: Give us an exception.

By the Court: Exception allowed.

Q. Did you sign—

By Mr. Horton: We object to the question as leading and suggestive.

Q. Did you or did you not sign a statement?

By the Court: Overruled, exception allowed. You may answer the question.

Q. Answer yes or no.

A. Yes.

[fol. 112] Q. Did you or did you not sign two statements?

A. I signed two statements.

Q. Did you do that of your own free will and voluntarily?

A. No, sir.

Q. Were there or were there not any threats made?

A. Yes sir, there was threats made.

Q. You state in your own way to the Court what took place after you were arrested.

A. When they arrested me at my home, two officers arrested me when I came home one night. As they was bringing me down Jefferson Street, they started beating me.

Q. What officers?

A. One was Reasor Cain. The other one, I didn't know his name.

Q. You didn't know the other officer?

A. No sir.

By Mr. Horton: We object as incompetent, irrelevant and immaterial, and not going to the exhibit that the State has offered in evidence.

By the Court: It might go to the condition of the defendant's mind. Let him state. He has a right to state what treatment he received while in the custody of the officers.

By Mr. Horton: I believe something they claim was done to the defendant on a prior occasion to the time he made the confession we offer is immaterial. If they can prove threats and violence made at the approximate time this confession was made, that would be admissible, but to go back and show a former course of conduct had at another time, by other people, or another occasion, than the people before whom he made this confession, is not admissible. If they show that the people before whom he made this confession mistreated him, that would be admissible. But what some- [fol. 113] body else die, certainly witnesses could not be chargeable with the conduct of officers who had him in custody at another occasion, and who knew nothing about their course of conduct.

By Mr. Belden: The law is that a confession obtained under duress, force, or threats, if a confession is obtained under those conditions, and a later confession is obtained, that later confession is no more competent to be introduced than the first, if a defendant has undergone those experiences before he makes any confession.

By the Court: Have you a citation on that?

By Mr. Belden: Yes sir.

By the Court: Let's hear it.

By Mr. Belden: I will say further at this time, that we will show that force and violence were used at the peniten-

tiary at the time that the second purported confession was obtained.

By Mr. Horton: That might be admissible, but surely not something that goes back and what somebody else did. If they show that Mr. Dunn, or Mr. Marshall, or Mr. Van Raulston did something, that would be admissible, but something Reasor Cain or somebody else did would not be admissible to disprove a statement made on a different occasion.

By the Court: You lose sight of the Court's idea of the proposition about his state of mind, which might have been created in this boy's mind by something done prior to that. He might not have known the difference in the officers that held him then and the officers that held him before. He might have been in that state of mind, I don't know, and I want to find out if his mind had been placed in the condition that placed fear through his mind through the whole time. I want him to have a trial according to the law and the evidence in the case. That is my sworn duty, to see that he gets it. That is what I want, to see that he gets. Go ahead and read that law.

[fol. 114] By Mr. Marshall: I found out on coming here that there is no library available, but I know the exact title of the case I refer to, Dave Canty vs. State of Alabama, decided in the United States Supreme Court about March, 1940, about two or three weeks after the decision of a case in Florida. That case was reversed and remanded on the petition for certiorari alone, no argument, the State was not permitted to argue it, there was no opinion but memorandum, and the facts are essentially these: Canty was in prison in Alabama. He was taken from Kilby prison to Montgomery and taken to the police station and beaten severely. After he was beaten practically to the extent that he did not know what he was doing, they asked him if he was ready to confess. He said he would say anything to keep from being beaten. They carried him back to the penitentiary at Kilby, and they had the warden and a group of citizens who knew nothing about the beating in Montgomery. Canty was asked in the presence of witnesses, do you want to make a statement? Canty said yes. They asked him, Are you making this statement of your free will and voluntarily, and he said yes. I submit that that case was reversed on the brief of Chambers which showed force and violence were used, and the facts are close. He

was not beaten at the Kilby prison. The beating took place miles away, in Montgomery, Alabama, and the Court reversed that case, saying that force and violence could not be used. As I said before, there is no opinion, there is merely a memorandum, and the facts as I have given them are, as nearly as I can recollect, the record of the case, and I am familiar with them for I prepared the petition for the writ of certiorari. It is awfully close to this case.

By the Court: I will permit you to testify. Note the exception.

By Mr. Belden: Will you read the question to him, Mr. Reporter.

Q. You didn't know the other officer?

A. No sir.

[fol. 115] Q. You stated that it was on Jefferson Street?

A. Yes sir.

Q. That is the street—

A. —that runs by here.

Q. Just south of here, running east and west?

A. Yes sir.

Q. Whereabouts on Jefferson street was it they beat you?

A. About a quarter of a mile, about three blocks down Jefferson Street from the court house.

Q. East of here?

A. Yes sir.

Q. Tell the Court what they did.

A. After they got further down, closer, the officer that had—

Q. Just a moment. Tell what this man did that beat you.

A. The officer that had me, tied me with my belt.

Q. Just a moment. You were tied?

A. Yes sir.

Q. Where were you when you were tied?

A. At my mother-in-law's home.

Q. And tied you with?

A. My own belt.

Q. How?

A. Put my hands behind me, like that.

Q. Your hands were tied behind you?

A. Yes sir.

Q. Tell the Court where you were, as nearly as you can state, when you were struck first and by whom.

A. I was first struck by the officer that had me tied. He knocked me down and kicked me.

Q. Where was that?

[fol. 116] A. That was three or four blocks down Jefferson Street. As we come further he had Mr. Reason Cain to break him off a piece of one-inch board about three feet long, then he would strike me across the head (indicating).

Q. Who struck you?

A. The officer that had me tied. I didn't know his name.

Q. Would you recognize him if you saw him?

A. Yes sir, I would recognize him.

Q. But you knew the other officer's name was Reason Cain?

A. Yes sir.

Q. Go ahead.

A. The officer that had me tied kicked me, threatened me, told me all about how he was going to burn me, and how he was going to kill me by degrees if I didn't confess to his crime. Then he taken me down about a block to the side of the court house to a tree and bumped my head against that tree for ten or fifteen minutes, then brought me to jail, carried me up stairs, and the jailor hit me in the mouth with the keys.

Q. Give the name of the jailor if you know.

A. Mr. Leonard Holmes.

Q. Where did he hit you?

A. He hit me in the mouth.

Q. You say he hit you with the keys. What keys?

A. Jail house keys.

Q. Where were you in the jail at the time he struck you with the keys?

A. I was on the women's side.

Q. Have you seen those keys more than once?

A. Yes sir.

Q. How large are they?

A. They weigh about five pounds, I guess.

[fol. 117] Q. More than one?

A. Yes sir.

Q. And fastened on a ring or something?

A. Yes sir.

Q. You were in the women's department at that time?

A. Then Mr. Floyd Brown he hit me, kicked me and knocked me down.

Q. Tell the Court who Floyd Brown is if you know.

A. Mr. Brown is a deputy sheriff.

Q. He did what?

A. He hit me and knocked me down.

Q. What did he hit you with?

A. His fist.

Q. Where did his fist strike you?

A. In the face. Then he kicked me in the stomach and ribs.

Q. Who did.

A. Mr. Floyd Brown.

Q. Then what happened?

A. They put me in jail about five minutes and brought me to the office.

Q. Who come and got you?

A. Mr. Leonard Holmes.

Q. The jailor?

A. Yes sir, and Floyd Brown. And brought me down stairs, and there was a bunch of officers waiting for me there.

Q. What do you mean by down stairs?

A. In the jail house, bottom floor of the jail. They brought me from there on to the office here, also the sheriff's office.

Q. Into the sheriff's office?

A. Yes sir, and carried me in another little room.

[fol. 118] Q. Another little room in the sheriff's office?

A. It sits on the side of the sheriff's office.

Q. Who was present at that time?

A. Mr. Floyd Brown and Mr. Van Raulston.

Q. Who is Van Raulston?

A. Deputy sheriff.

Q. You would know him if you saw him?

A. Yes sir.

Q. And who else?

A. Mr. C. C. Crabbe.

Q. And who is he, if you know?

A. He is a ballistic expert.

Q. Who else?

A. The highway patrolman.

Q. State his name if you know.

A. I don't know his name.

Q. Would you know him?

A. He is low.

Q. And heavy set?

A. Yes sir.

Q. Who else?

A. Then the sheriff. He was in there for a while.

Q. What is his name?

A. Mr. Roy Harmon.

Q. All right. That is five. Were there any more in there?

A. Another highway patrolman was in there, Mr. Harvey Hawkins.

Q. Would you know him if you saw him?

A. Yes sir, a tall man.

Q. They were in the room by the side of the sheriff's office?

A. Yes sir.

[fol. 119] Q. Tell what took place?

A. They started beating me with fists.

Q. Who started beating you with fists?

A. The investigator. I never did know his name.

Q. An investigator?

A. Yes sir.

Q. Why do you call him an investigator?

A. Because I aint never seen him here before.

Q. Not one of the regular laws?

A. No sir.

Q. Would you know that man if you saw him again?

A. Yes sir.

Q. Have you seen him since that time?

A. I seen him once.

Q. State what was done.

A. They started beating me with their fist, bumping my head against the wall.

Q. Bumping you head against the wall?

A. Side of one of the walls in the office.

Q. Go ahead.

A. Then made me stand against the wall, hand over head, up, while he kicked me. He had on cowboy boots, and he kicked the skin off my shins.

Q. Do you know which one that was?

A. No sir, I don't know his name. He was a slim guy.

Q. Go ahead.

A. They smashed their fists in my face.

Q. Who did?

A. That investigator, and kicked me in the stomach and ribs, and knocked me down, and blacked and closed my eye.

Q. What officers, if you know, if any, took part in that?
[fol. 120] A. Mr. Floyd Brown, he taken part in it.

Q. Who else?

A. The highway patrolman.

Q. One or both of them?

A. The one that I don't know his name.

Q. Which one of them?

A. The low one.

Q. The heavy set one?

A. Yes sir.

Q. And the other one was Mr. Hawkins?

A. Yes sir.

Q. Didn't touch you that night?

A. No sir.

Q. Did the sheriff beat you?

A. No sir.

Q. The sheriff didn't?

A. No sir.

Q. Go ahead.

A. Mr. Howard Roar, a constable.

Q. Roar?

A. Yes sir.

Q. A constable?

A. He helped beat me, he hit me in the face with his fist and kicked me, and doing all kinds of threatening.

Q. What did they threaten? Tell the Court what they said.

A. You God damned son-of-a-bitch, you committed that crime and you are going to tell us. I told them I didn't know anything about that crime. They went to beating me harder and kept beating me about two hours, and the sheriff came and stopped them.

Q. The sheriff was not in there all the time?

A. No sir.

[fol. 121] Q. And after about two hours he came and stopped it?

A. Yes sir, and they carried me to the jail house, didn't bother me for eleven days, but questioned me once or twice between that time.

Q. And from that time they took you back to the jail?

A. Yes sir.

Q. And did not question you for several days?

A. No sir.

Q. I mean you said they did question you but didn't do anything more to you?

A. Yes sir.

Q. What do you mean by not doing anything more to you?

A. Didn't beat me any more.

Q. Was there anything on your person, your body, or face, after that beating, that would show where people could see it?

A. Yes sir.

Q. What was it?

A. My eye was black and closed.

Q. Which eye?

A. Right eye. My lips was bursted, and shoulder, face was swollen, and scalp busted there, where I was hit with the two by four, and my nose was bleeding, and stayed that way a week.

Q. How about the rest of your body any place, was there anything that people could see, that was noticeable?

A. Not that night. The only thing they could see was my face.

Q. You say it was eleven days before you were beaten again?

A. Yes sir.

Q. Tell the Court what happened then.

A. They came and got me about six thirty.

Q. When you say they, tell each time who it was.

[fol. 122] A. Mr. Holmes, the Jail man, and the highway patrolman.

Q. Which one?

A. The low one, and Mr. Floyd Brown, and they took me to the bottom floor, and the highway patrolman threatened me with a blackjack.

Q. Let's get it straight. Which one was it?

A. The low one.

Q. The heavy set one?

A. Yes sir.

Q. And that was where?

A. Down on the bottom floor.

Q. Were your hands free or not?

A. No sir, they were handcuffed.

Q. Going back to the time you were first beaten, were you handcuffed or not?

A. No sir.

Q. You were not handcuffed?

A. No sir.

Q. But you were handcuffed this time on the bottom floor of the jail?

A. Yes sir.

Q. And you say the highway patrolman hit you with a blackjack?

A. Yes sir.

Q. What do you mean by a black-jack? Describe whatever it was.

A. A blackjack is a piece of leather, loaded with shots, or lead, or something.

Q. Where were you struck?

A. On the back of the head, and on the neck. Then they brought me in here and carried me up in the county attorney's office.

Q. The County Attorney's office?

[fol. 123] A. Yes sir.

Q. What time in the day was that?

A. That was after six thirty in the evening.

Q. In the County Attorney's office?

A. Yes sir.

Q. Can you tell the Court who were present in the County Attorney's office?

A. Mr. Roy Harmon, the sheriff.

Q. Who is that? That is the sheriff?

A. He was present.

Q. Who else?

A. Off and on.

Q. You mean he was present?

A. On and on.

Q. He was in and out?

A. Yes sir.

Q. And not present all the time?

A. No sir.

Q. Who else?

A. Mr. Floyd Brown, he was present all along.

Q. The deputy Sheriff?

A. Yes sir.

Q. And he was present all the time, you think?

A. Yes sir.

Q. And who else?

A. Mr. Van Raulston.

Q. Who is he?

A. Deputy sheriff.

Q. Who else?

A. Mr. Cheatwood.

Q. Mr. Cheatwood?

[fol. 124] A. Yes sir.

Q. Do you know who he is?

A. He is the special investigator from Oklahoma City.

Q. Who else?

A. Both of the Highway patrolmen. One was Mr. Harvey Hawkins.

Q. Was there anyone else?

A. There was the County Attorney, Mr. Norman Horton.

Q. All right.

A. Then the Assistant County Attorney.

Q. What is his name?

A. I don't know his name.

Q. State the first thing that was done or said when you got up in the county attorney's office, as you recall.

A. Mr. Cheatwood handcuffed me in a chair, like this.

A. Did what?

A. Handcuffed me in a chair, and the county attorney was sitting on the left side of me, and Mr. Cheatwood was standing in front of me, Mr. Reasor Cain was behind me.

Q. Cain?

A. Cain.

Q. Did you know who he was?

A. He was a railroad detective.

Q. All right.

A. And the highway patrolman, the low one, on the right side of me, and Mr. Cheatwood he started beating me.

Q. Was anything said to you there?

A. Yes sir.

Q. Tell the Court what it was.

A. They told me—Mr. Cheatwood called me a black son-of-a-bitch, and threatened to stick red hot irons to me to make me confess to a crime, and Mr. Cheatwood was say-
[fol. 125] ing: Didn't you commit the crime? I told him no. Mr. Cheatwood was yelling, "Why don't you answer that prosecutor's question?"

Q. Telling you to answer the prosecutor's questions?

A. Yes sir.

Q. That is what was said?

A. Yes sir. Then he was beating on me all that time.

Q. How was he beating you?

A. Beating me with a black-jack. He was sitting in front of me, whipping me on the legs and knees and hands, and shoulders and arms.

Q. What kind of black-jack was that?

A. It was a flat one, loaded with some kind of shot, because every time he hit me it rattled inside.

Q. How large was it?

A. About that large (indicating).

Q. Did it have a handle?

A. Yes sir.

Q. About how wide was it?

A. It looked about that wide.

Q. Tell it in inches.

A. Shaped something like a milk bottle.

Q. Shaped something like a milk bottle.

A. Yes sir.

Q. Where did he first strike you?

A. The first lick he struck me was the back part of my head.

Q. Who was that?

A. The highway patrolman.

Q. Which one of them?

A. The low one.

Q. The heavy set one?

[fol. 126] A. Yes sir, and they taken me up several times on a table like this, taken me across it and whipped me on the back.

Q. Bent you across a table and beat you on the back?

A. Yes sir.

Q. State what they beat you with?

A. The same blackjack.

Q. Who did that?

A. The low highway patrolman and Mr. Cheatwood and Mr. Reasor Cain.

Q. All beat you with the blackjack?

A. One would beat me for an hour and a half or two, then he would get tired; and the other would take me, and beat me that way all night.

Q. Were they asking you questions during that time?

A. Yes sir.

Q. What were you telling them?

A. I told them I didn't know.

Q. Didn't know what?

A. Didn't know nothing about the crime.

Q. Go ahead and tell the Court, was there any other means used besides beating you with a blackjack?

Q. Reasor Cain was behind me. He beat me with his fist behind my head, then he would pull my hair, they he would shake my head, and hit me with his fist every once in a while, and Mr. Cheatwood he was hitting me and beating me in front, on the knees and legs and arms and shoulders with the blackjack.

Q. All right.

A. They beat me, beat me, beat me, kept yelling questions at me.

Q. Tell the Court the tone of voice, whether they talked in ordinary tone of voice.

[fol. 127] A. No sir.

Q. Tell the Court what sort of voice they used.

A. They was yelling, saying: "You answer that prosecutor's questions." I told them I didn't know anything to answer. He told me I would answer it before forty eight hours from that.

By the Court: Said what?

A. He told me I would answer it before forty eight hours from that.

Q. Was anything else done to you?

A. They beat me just like that, over and over all night.

Q. Along until about four thirty in the morning?

A. About four thirty, yes sir.

Q. You say they started at something like six o'clock in the evening and beat you until about four thirty in the morning?

A. Yes sir.

Q. Tell the Court what took place then.

A. Beat me and beat me until I couldn't stand no more, until I gave in to them and answered the questions that they demanded.

Q. Tell the Court what that question was.

A. They asked me did I kill Mr. Elmer Rogers.

Q. They asked you if you killed Mr. Elmer Rogers?

A. Yes sir.

Q. Who asked that?

A. Mr. Prosecutor.

Q. Do you mean Mr. Horton, the County Attorney?

A. Yes sir.

Q. What did you say?

A. I told him no.

Q. Then what was done or said?

A. Then Mr. Cheatwood he hit me again.

Q. What with?

[fol. 128] A. The same blackjack.

Q. Where did he hit you?

A. Hit me on the legs.

Q. Then what happened, if anything?

A. He come and told me, "Lyons, you old black son-of-a-bitch", and told me I was lying, told me I'd better answer those questions, or either I takes some more beating.

Q. Did you answer the questions?

A. I answered the question that the prosecutor demanded.

Q. And what was it?

A. He asked me did I kill Mr. Rogers and I told him no.

Q. Then what?

A. They started beating me some more, and yelled to me to answer the prosecutor's questions?

Q. What did you say then?

A. I went on and answered his questions.

Q. What did you say to that?

A. I said yes.

Q. You said yes?

A. Yes sir.

Q. Were they beating on you at that time?

A. Yes sir.

Q. Who was beating you?

A. Mr. Cheatwood.

Q. Was it true that you had killed him?

A. No sir.

Q. Why did you say you had?

A. Because I was forced to.

Q. What do you mean by you was forced to?

A. I was beat with a blackjack, tortured all night long.

[fol. 129] Q. Why did you say yes?

A. Because I feared I would get some more torture.

Q. That was about what time in the night?

A. That was in the morning about four thirty.

Q. Go ahead and tell what happened then, if anything.

A. Then after they forced me to answer the questions, the sheriff, he helped lift, taken me by the hands and pulled me out of the chair; because I couldn't get up.

Q. The sheriff took you by the hand and helped you out of the chair?

A. Yes sir.

Q. All right.

A. And taken me by the arm and led me down stairs and carried me to the jail house, and turned me over to the jailor, and the jailor taken me up stairs. I stayed about five minutes and they came and got me again.

Q. Who came and got you?

A. Mr. Leonard Holmes, Mr. Floyd Brown, and the highway patrolman.

Q. Which highway patrolman?

A. The low one.

Q. The heavy set one?

A. Yes sir.

Q. Then what happened?

A. Then they brought me back to that same little room by the sheriff's office.

Q. All right.

A. And kept me there awhile until they ate breakfast, then they was going to take me out.

Q. To take you where?

A. To take me to the scene of the crime.

[fol. 130] Q. Did they do anything else to you when they had you there in the county attorney's office? Did they bring any—to refresh your mind, did they put anything on your lap?

A. They brought a pan full of bones that they said come from those bodies.

Q. A pan full of bones?

A. Yes sir.

Q. That came from what bodies?

A. Of Mr. and Mrs. Rogers.

Q. What did they do with them?

A. They set them up on my lap.

Q. Set them on your lap?

A. Yes sir.

Q. Was that done before you finally said you did kill Mr. Rogers?

A. Yes sir.

Q. Was anything else done?

A. No more than beating.

Q. Start out from where they were going to take you to the scene of the crime, and tell the Court.

- A. They put me in a car.
Q. Who was with you?
A. The slim highway patrolman.
Q. Name him if you know.
A. Mr. Harvey Hawkins.
Q. Who else?
A. Mr. Floyd Brown, the deputy sheriff.
Q. Floyd Brown?
A. Yes sir.
Q. Who else?
A. The assistant prosecuting attorney.
[fol. 131] Q. You don't know his name?
A. No sir.
Q. All right.
A. Mr. Cheatwood.
Q. Who else, if anyone?
A. That is all.
Q. Now you got in whose car?
A. The highway patrolman's car.
Q. Where did you go?
A. They taken me to the scene of the crime.
Q. All right, what was said or done there?
A. They was threatening me.
Q. Who was threatening you?
A. The highway patrolman and Mr. Cheatwood.
Q. Which one?
A. The slim one.
Q. Give his name if you can.
A. Mr. Harvey Hawkins.
Q. All right, who else?
A. Them was the only two that threatened me.
Q. Mr. Hawkins and Mr. Cheatwood?
A. Yes sir.
Q. What did they say? Tell it to the Court.
A. They told me they was taking me down there to kill me.
Q. Which one said that?
A. Mr. Cheatwood, asked me didn't I want to say my prayers.
Q. Did you want to say what?
A. Didn't I want to say my prayers.
Q. What did you say, if anything?
A. I told him no sir.
Q. Where was that? Where were you?

[fol. 132] A. On the way down there.

Q. While you were in the highway patrolman's car on the way down there?

A. Yes sir.

Q. Go ahead.

A. They taken me to the scene of the crime and made a big fire which they said they were going to burn me with.

Q. How was that?

A. They taken me to the scene of the crime, and made a big fire which they said they were going to burn me with.

Q. Who said they were going to burn you?

A. Mr. Harvey Hawkins.

Q. Go ahead and tell the Court.

A. Then Mr. Cheatwood and Mr. — and the assistant County Attorney, they left in the highway patrolman's car.

Q. Who was it that left?

A. Mr. Cheatwood and the assistant County Attorney.

Q. Left in the highway patrolman's car?

A. Yes sir.

Q. And that left who there?

A. That left Mr. Floyd Brown and Mr. Harvey Hawkins.

Q. Tell the Court what was done and said then.

A. Mr. Harvey Hawkins threatened me.

Q. What do you mean by threatening you?

A. Threatened to burn me, threatened to beat me with a pick hammer, if I didn't do like they said.

Q. Did he have a pick, pick hammer?

A. Yes sir.

Q. What did he tell you to do?

A. Threatened to beat me, and burn me if I didn't do like he told me.

[fol. 133] Q. What did he want you to do?

A. He told me to answer all the questions, and told me I had better not change what I had said.

Q. To answer all the questions?

A. Yes sir.

Q. What were the questions?

A. Such as they asked me, was I guilty, was accusing me of being faulty.

Q. What did you say, if anything?

A. I told him I wasn't.

Q. Tell the Court what else took place, if anything, out there.

A. The highway patrolman, Mr. Harvey Hawkins, and Mr. Floyd Brown search all over the place, looking under black chars and bricks and thin sheets of snow that had fallen on the ground, and I was standing by the fire.

Q. You were standing by the fire?

A. With my back to them.

Q. Where was the fire with reference to where the house had been?

A. On the east side.

Q. To the east of where the house had been?

A. Yes sir.

Q. How far east of where the house had been?

A. About as far as to the wall over there.

Q. And you were over there, standing there?

A. Yes sir.

Q. And they were doing what?

A. They were searching all over the place.

Q. State what happened, if anything?

A. When I turned around, Mr. Harvey Hawkins had [fol. 134] an axe in his hand. He went to saying I knowed something about it. I told I didn't know nothing about it.

Q. Do you know where they got the axe?

A. No sir.

Q. Do you know where they said they got it?

A. Yes sir.

Q. Where?

A. They said they got it out of the ashes.

Q. They said they got it out of the ashes?

A. Yes sir.

Q. Do you remember whether that was their words?

A. Yes sir, that was their words.

Q. Did you see the axe?

A. I seen it after they produced it.

Q. Did you see them pick it up?

A. No sir.

Q. Who had it when you first saw it?

A. Mr. Harvey Hawkins.

Q. Mr. Harvey Hawkins?

A. Yes sir.

Q. Was the handle in it or not?

A. No sir.

Q. Then what?

A. They accused, he accused me, they accused me of putting it there, saying I knew something about it.

Q. What did you say, if anything

A. I told him I didn't know anything about it. He threatened to torture me some more.

Q. To torture you how?

A. With the blackjack, like Mr. Cheatwood was beating me with.

Q. Tell the Court what happened?

[fol. 135] A. And Mr. Cheatwood and the County Attorney, they drove up with Mr. Vernon Colclasure.

Q. Cheatwood, the Assistant County Attorney, and Mr. Vernon Colclasure

A. Yes sir.

Q. And they came up in the highway patrolman's car?

A. Yes sir.

By Mr. Horton: We object to that as leading.

By the Court: Sustained, don't lead.

Q. All right. Was it the assistant, or the county attorney? was it Mr. Horton or his assistant?

A. That come back with Mr. Colclasure?

Q. Yes.

A. It was the assistant County Attorney and Mr. Cheatwood.

Q. Go ahead and tell what happened.

A. Mr. Harvey Hawkins showed Mr. Cheatwood and the assistant County Attorney this axe, and said that I showed it to him.

Q. He said you showed it to him?

A. Yes sir.

Q. Was that true?

A. No sir.

Q. How far were you from Mr. Hawkins? Was Mr. Brown with him?

A. Yes sir.

Q. And Mr. Brown when they first showed you this axe?

A. About as far as to that door over yonder.

Q. Go ahead.

A. And then Mr. Harvey Hawkins asked me where I was hunting then.

Q. Where you were hunting?

[fol. 136] Q. When?

A. The same time, right after they found that axe.

Q. Did you tell them you had been hunting?

A. Yes sir.

Q. When was it?

A. That I went hunting?

Q. Yes.

A. New Year's Day.

Q. What time in the day was it?

A. Between nine and eleven o'clock.

Q. Between nine and eleven o'clock that morning?

A. Yes sir.

Q. Where did you go hunting that morning?

A. I went in Mr. George Hall's pasture.

By Mr. Horton: We object as incompetent, irrelevant, and immaterial, and not tending to support the objection to the offer in this case. Incompetent, irrelevant and immaterial for the reason that no question was raised about what he was doing, and is a self-serving statement of the defendant, and has no bearing on this offer.

By Mr. Belden: If the Court please, the part of the purported confession does take it to where two empty shells were found, and we are laying a ground for that.

By the Court: I realize that,

By Mr. Horton: Before the confession has been introduced, to treat it offered?

By the Court: I don't know what is in the confession, whether there is anything about shells.

By Mr. Horton: It goes to what force was used.

By the Court: But we have him with the officers.

By Mr. Horton: Not while he was hunting. He has gone back to New Year's Day, before the crime was committed [fol. 137] on that day.

By the Court: But he is testifying to a time when he was taken to the scene of the crime and says that the officers asked him to show them where he was hunting New Year's Day.

By Mr. Horton: If he was hunting it has nothing to do with the confession.

By the Court: I will let him tell it. If it doesn't I won't let them consider it.

Q. Did you do any shooting that morning?

A. Yes sir.

Q. How many times?

A. Twice.

Q. What did you shoot at, if anything?

A. A rabbit.

Q. What kind of shells were you using?

A. No. 4 shot.

Q. What gauge?

A. Twelve gauge.

By Mr. Horton: We renew our objection as being incompetent, irrelevant and immaterial.

By the Court: Overruled. This is not before the jury at this time.

By Mr. Horton: I don't see his purpose in bringing out the testimony as to what he did *no* New Year's Day, no effort is made to show that he was beaten that day.

By the Court: He is testifying about what those officers were having him to do.

By Mr. Horton: He is testifying about hunting, how many shells he shot, and killing a rabbit.

By the Court: Tell where the officers had him taken to.

[fol. 138] Q. Did they have you take them to some place away from there?

A. Yes sir.

Q. Away from where the Rogers house had been?

A. Yes sir.

Q. How far away from there did they have you take them?

A. It was just about a quarter of a mile or a half, southeast, about one block from the highway.

Q. Where were you going to? What were you going down there for?

A. When the officers had me?

Q. Yes.

A. To show them the shells I was hunting with.

Q. Did you find them?

A. Yes sir.

Q. How many?

A. Two.

Q. Where did you go from there?

A. They taken me on to the highway. We got in the car and taken Mr. Colclasure home.

Q. Taken Mr. Colclasure home?

A. Yes sir.

Q. Where did you go then?

A. We returned back to Hugo.

Q. Then what happened, if anything?

A. They put me in jail.

Q. All right.

A. And about two o'clock that day they brought a statement up there.

Q. About two o'clock that day they brought a statement up there?

A. Yes sir.

Q. Did you know what that statement was?

[fol. 139] A. I didn't know what it was then.

Q. Who brought it up there?

A. The Assistant County Attorney and the Court Clerk.

Q. The Assistant County Attorney and the Court Clerk.

A. And Mr. Cheatwood.

Q. Do you know the name of the Court Clerk?

A. Mr. Haskell Floyd.

Q. And they had a statement, did they?

A. Yes sir.

Q. Tell the Court what took place then.

A. Then Mr. — the Assistant County Attorney gave it to me and told me to sign my name. I asked him what was I signing.

Q. You asked the Assistant County Attorney what you were signing?

A. Yes sir, and Mr. Cheatwood spoke up and told me? "Never mind, I said go ahead and sign your name on it."

Q. He said, "Never mind, I said go ahead and sign your name on it?"

A. Yes, sir, then I signed my name on it.

Q. Did anyone ask you any further questions then?

A. No sir. And a little after that, they brought me out in the jail house yard.

Q. In the jail house yard?

A. Yes sir, and taken my picture.

Q. Did they just take your picture by itself?

A. Mr. Cheatwood and Mr. Roy Harmon taken their picture with me. Then after that Mr. Reason Cain and Mr. Floyd Brown, —

Q. Reason Cain and Floyd Brown?

A. Carried me to their car.

Q. Took you to their car?

A. Yes sir, and carried me to the Antlers jail.

[fol. 140] Q. What time of day did you get in there?

A. About three thirty.

Q. In the afternoon, or what?

A. Afternoon.

Q. They put you in the Antlers jail?

A. Yes sir.

Q. About three thirty?

A. Yes sir, and I remained there until sundown.

Q. Where did you go?

A. Mr. Van Raulston and another man came and got me.

Q. Did you know the other man?

A. No sir.

Q. Would you know him if you should see him, do you think?

A. Yes sir.

Q. Where did you go?

A. They took me to McAlester to the State Penitentiary.

Q. When you got there what did you do? The first time when you got to the penitentiary?

A. The warden told Mr. Van Raulston—

By Mr. Horton: We object to the hearsay.

By the Court: Sustained.

A. They carried me in the warden's office.

By the Court: (Q) Who did that.

A. Mr. Van Raulston, and sat me down in a chair.

Q. Sat you in a chair?

A. Yes sir.

Q. Were you handcuffed?

A. No sir.

Q. You were not handcuffed at that time?

A. No sir.

Q. Tell the Court what happened, if anything.

[fol. 141] A. Mr. Dunn started questioning me.

Q. Who did?

A. Mr. Dunn.

Q. Mr. Dunn, the warden?

A. Yes sir.

Q. Can you tell the Court what was said? What he said to you, just as you can remember?

A. He asked me did I shoot those people.

Q. What did you tell him?

A. I said no sir.

By Mr. Horton: We object to that statement. The transcript by the stenographer at that time would be the best evidence of what he said.

By Mr. Belden: Certainly we have a right to show what was said.

By Mr. Horton: We withdraw the objection.

Q. Go ahead.

A. I told him no.

By the Court: (Q) Was that the first thing they asked when you went in?

By the Court: (Q) The very first thing they asked?

A. Yes sir, the warden.

Q. You told who no?

A. Mr. J. F. Dunn, the warden.

Q. He asked you the question if you killed those people and you told him no?

A. Yes sir.

Q. What else was said, if anything?

A. Mr. Van Raulston told me I was lying.

Q. Van Raulston told you that you were lying?

[fol. 142] A. Yes sir.

Q. Go ahead.

A. Mr. Dunn, the warden, questioned me about thirty minutes and I kept saying no. Mr. Van Raulston out with a blackjack and said, "I'll make him talk."

Q. Van Raulston took out a blackjack and said, "I'll make him talk?"

A. Yes sir.

Q. You were in the warden's office?

A. Yes sir.

Q. Standing up or sitting down?

A. Sitting down in a chair, Mr. Dunn, the warden, and Mr. Van Raulston, and that other man, was the only ones present at that time.

Q. Three of them?

A. Yes sir.

Q. All right.

A. Mr. Van Raulston beat me with a blackjack.

Q. Where did he strike you?

A. On the legs, arms, and knees.

Q. On the legs, arms and knees with a blackjack?

A. Yes sir.

Q. What kind of blackjack was that?

A. It was a round kind, a common blackjack.

Q. After he beat you with the blackjack on the arms, knees and legs, what did you do, if anything?

A. They went to accusing—Mr. Van Raulston was accusing me of the crime, said I committed it, and was telling me how the crime happened, and I was still answering no. Then Mr. Van Raulston said, "You either answer our questions or get treated like you was down at Hugo."

[fol. 143] Q. Mr. Van Raulston said you either answer our questions or you will be treated like you were down at Hugo?

A. Yes sir.

Q. Is that correct?

A. Yes sir.

Q. Go ahead.

A. He beat me awhile longer, until I couldn't stand it any more, I was already hurting from—already hurting from that last night beating, I hadn't had any sleep since that Sunday night. It was Tuesday night then. Mr. Van Raulston asked me was I ready to answer his question, and I told him yes, and Mr. Dunn he sent and got a stenographer and Mr. Dunn and Mr. Van Raulston was telling me how the crime happened.

Q. They told you how it happened?

A. Yes sir. And really forced me before the stenographer come in to answer all the questions that they demanded.

Q. They forced you to answer all the questions they demanded before the stenographer came in?

A. Yes sir. When the stenographer come in he taken it down.

Q. She took them down?

A. And after—

Q. Did they beat you while the stenographer was in there?

A. No sir.

Q. But they had been before that?

A. Yes sir.

Q. Go ahead.

A. After he got it wrote out, Mr. Dunn, the warden, he sent and got the chaplain.

Q. Mr. Dunn, after they got it wrote out, he sent and got the chaplain and brought him in?

A. Yes sir.

[fol. 144] Q. Go ahead.

A. Mr. Dunn told him to sign his name on the statement.

Q. Told who to sign it?

A. The chaplain and two other men.

Q. Did they use any force on you while the chaplain was there?

A. No sir.

Q. Did they ask you the question about if you were signing it of your own free will at that time?

A. No sir.

Q. What happened after that?

A. They carried me to the deputy warden's office, sat me in a chair. I sat there about two hours waiting on—I didn't know what I was waiting on. I asked for food; I hadn't eaten any supper.

Q. About what time was that?

A. That was about eleven o'clock.

Q. Day or night?

A. At night. Then Mr. Dunn sent a guard. The guard carried me back to the kitchen and I ate. And I come back to the deputy warden's office, and sat there about two hours longer. I sat up there and nodded, I went to sleep in the chair, and then Mr. Dunn called me.

Q. What did he say?

A. Mr. Dunn asked me was I sleepy.

Q. Mr. Dunn asked if you were sleepy?

A. Yes sir.

Q. All right.

A. Then he sent a guard to take me on down in the basement where the death cells were.

Q. Where the death cells were?

A. Yes sir, by the electric chair.

Q. Where the electric chair is?

[fol. 145] A. Yes sir.

Q. What did they do?

A. A guard put me in one of the cells.

Q. In a cell where?

A. In the death cell row.

Q. How far from the electric chair were you?

A. About as far as from here to that second door.

Q. About as far as from there to the second door?

A. Was there any conversation at that time about the electric chair?

A. Mr. Dunn told me he had done sent down thirty nine men.

Q. Mr. Dunn told you he had sent down thirty nine men?

A. Yes sir.

Q. Sent them where?

A. To death in the electric chair.

Q. Mr. Dunn, the warden, told you that?

A. Yes sir.

Q. What else was said, if anything?

A. Then he told me if I wouldn't plead guilty, then I would be the fortieth one.

Q. Go ahead and tell what else he said.

A. Then I got scared.

Q. You got scared?

A. Then I was scared.

Q. All right.

A. I thought he was telling the truth.

Q. What do you mean by that?

A. I meant I thought he was going to kill me sure enough.

Q. Go ahead.

A. And they kept me there two nights.

Q. Kept you in the death cell two nights?

[fol. 146] A. That is where I slept that night. Then they taken me up in the house, to the fourth floor and put me in a cell up there. And then they didn't bother me any more until about Saturday morning.

Q. On Saturday morning? Do you know the date?

A. 28th day of January, 1940.

Q. The 28th day of January, 1940?

A. Yes sir.

Q. Then what happened?

A. They brought me down early one morning, the same day they were having a preliminary hearing.

Q. Brought you down where?

A. To the warden's office.

Q. All right.

A. Mr. Cheatwood was there.

Q. Mr. Cheatwood was present?

A. He had handcuffs snapped on my — and sat me down in a chair.

Q. Go ahead from there.

A. Then he threatened me, told me when I got here I better plead guilty on the stand.

Q. He told you when you got here you had better plead guilty on the stand?

A. Yes sir.

Q. Is that right?

Q. Yes sir, either I wouldn't get back alive.

Q. Either you wouldn't get back alive?

A. Yes sir.

Q. What else?

A. I told him I didn't have nothing to plead guilty for.

Q. You said you didn't have nothing to plead guilty for?

[fol. 147] A. Yes sir.

Q. Go ahead.

A. He pulled out his blackjack and went to beating me again.

Q. He pulled out his blackja-k and went to beating you again?

A. Yes sir.

Q. Go ahead.

A. Then he forced me to answer some more of his questions while he was beating me.

Q. He forced you to answer some more questions while he was beating you?

A. Yes sir, when Mr. Dunn was present.

Q. Who?

A. Mr. Dunn, the warden. And the warden threatened me himself.

Q. What do you mean by that?

A. He threatened to hang me up on handcuffs.

Q. Just what do you mean?

A. I mean they handcuff you high enough so that your toes would be dragging the floor. He told me he would do that if I didn't.

Q. If you didn't do what?

A. Get on the stand and plead guilty.

Q. If you didn't get on the stand and plead guilty?

A. Yes sir.

Q. Go ahead.

A. They taken me out of the warden's office and brought me on back down here and had the preliminary hearing.

Q. They brought you back here for the preliminary hearing?

A. Yes sir.

Q. After the preliminary hearing what was done?

A. They carried me back to the penitentiary.

[fol. 148] Q. They took you back to the penitentiary?

A. Yes sir, and left me until they brought me back down here for trial.

By Mr. Belden: You may cross-examine him.

Cross-examination.

By Mr. Horton:

Q. Now, W. D., you seem to be very bitter in naming some of the officers you say mistreated you. You hadn't been here very long at that time, had you?

A. No sir.

Q. Where had you been prior to that time? Answer the question.

A. I was in the penitentiary.

Q. You were in the penitentiary?

A. Yes sir.

By Mr. Belden: Now, if the Court please—

By Mr. Horton: This is cross-examination.

By Mr. Belden: It certainly hasn't anything to do with anything brought out in the examination in chief, and we object to it as improper cross-examination.

By the Court: Overruled.

By Mr. Belden: Exception.

Q. How many times have you been in the penitentiary?

A. Twice.

Q. What were you sent to the penitentiary for?

A. I don't know.

Q. You don't know? How old are you?

A. Twenty-two.

Q. You are twenty-two?

A. Yes sir.

[fol. 149] Q. And you have been in the penitentiary twice?

A. That is right.

Q. Now you say, going back to that time they got you out of jail at six thirty, you say they brought you to my office?

A. Yes sir.

Q. And you say I was there?

A. That is right.

Q. Don't you know that I did not come to the office until ten o'clock that night?

A. You were in the office all that night.

Q. I was not in the office when you first came to the office, was I.

A. You were there until they stopped beating me.

Q. I wasn't there in the office until six thirty was I, when they beat you? Isn't it true that Vernon Cheatwood had a strap of leather, and was tapping you like that, and because you refused to answer questions they put to you?

By Mr. Belden: We object to the statement to intimidate the witness.

By the Court: Don't intimidate the witness, just the ordinary tone of voice.

A. That blackjack he had was loaded.

Q. How do you know it was loaded? You were insolent to the officers, and sat and sulked when I asked you questions, isn't that true?

A. No sir.

Q. You say they kept you in the office until four thirty the next morning?

A. That is right.

Q. And beat you?

A. That is right.

[fol. 150] Q. Isn't it true that you refused to answer, and they struck you on the knee with a piece of leather?

A. They struck me all night. I didn't rest any.

Q. You told me that night where you hid the axe, didn't you?

A. No sir.

Q. They didn't beat into you where you hid that axe, under the house, did they?

A. No sir.

Q. You told me?

A. I never told you.

Q. They didn't beat into your mind the knowledge about those two shells, where they were planted on the fence row between two trees, did they? You told me that night where they were, didn't you?

A. No sir.

Q. You seem to be confused about the names of the officers and particularly about the dates that all these occurred. You were brought here on the 28th of January for the preliminary hearing?

A. Yes sir.

Q. Didn't you know that the 28th of January was Sunday? Who told you that you were brought— on the 28th?

A. Nobody.

Q. If the 28th was on Sunday, you were not tried on Sunday, were you?

A. I was tried Saturday.

Q. And you say that was the 28th day of January?

A. All I know it was Saturday.

Q. Why did you say it was the 28th of January?

A. Because I thought it was on the 28th day of January.

Q. And you say you did not go out in the morning after you were in the county attorney's office and show the officers who had been looking for three weeks for the axe, [fol. 151] and go to the place and show them, under the window, after you had shot that woman, chopped her ribs out, and knocked her teeth out, and show them where that axe was found, where it was buried in the ground?

A. I didn't show them any axe.

Q. Didn't you tell me how you ran down that railroad track?

A. No sir.

Q. Why did you want to accuse Van Bizzell?

A. Because the officers forced me to accuse him.

Q. Forced you to accuse another man, did they? They didn't make you say Van Bizzell was with you, did they?

A. Sure, they did.

Q. Isn't it true that after they got through hitting you, as you say, with a strap of leather, and you refused to answer any questions at all times, that I made them stop whipping you, and told them to get out of the room, and I asked you if you wouldn't talk to me alone? Is that right?

A. They stopped whipping me.

Q. Didn't you talk to me alone about that crime?

A. No.

Q. You didn't?

A. No sir.

Q. After you talked to me alone, didn't Roy Harmon—

By Mr. Marshall: If the Court please, I wish the question, "Didn't you talk to me alone," and the next, "When you were talking to me alone—" there is nothing to assume something the man has not said; he denies it.

By the Court: I will permit him to cross-examine him.

By Mr. Marshall: Exception.

Q. When you were talking to me alone, didn't Roy Harmon come in?

A. I didn't talk to you alone.

[fol. 152] Q. And Roy Harmon didn't come in later?

A. Mr. Roy Harmon was already in there.

Q. He wasn't there when you first started talking to me, was he?

A. Yes, sir.

Q. Didn't you make a statement to me and Roy Harmon, when Cheatwood wasn't there, and Hawkins wasn't there, and Raulston, and you told us you killed the people, and where you put the axe?

A. No sir.

Q. And they came in and asked you to tell them and you told them?

A. No sir.

Q. You deny that now?

A. That is right.

Redirect examination.

By Mr. Belden:

Q. The County Attorney says that was just a strap they were beating you with. You say it was what?

A. It was a blackjack.

Q. And he says he stopped them from beating you. Did he do that?

A. No, sir, they stopped their own selves.

Q. About what time was that?

A. About four thirty in the morning.

Witness excused.

By Mr. Belden: Comes now the defendant, the defendant having testified as to the force and violence used by the various officers with a blackjack, beating and kicking, and other means of violence, having finally, after hours of torture, forced him, because of punishment and pain, to sign a

statement, and from the statements and admissions made by the County Attorney, we now ask that the purported confession [fol. 153] be suppressed and not admitted in evidence in this case.

By Mr. Horton: We would like to offer a little evidence in support of our response.

By the Court: It will be permitted.

ROY HARMAN, in behalf of the State of Oklahoma, in the absence of the jury, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. What is your name?

A. Roy Harmon.

Q. What official position did you occupy last January, 1940?

A. Sheriff in this County.

Q. Do you remember when W. D. Lyons was brought to the office of the county attorney one night in January of that year?

A. I do.

Q. Do you remember what time it was that they brought him to the office?

A. Not for sure. Seems to me like it was around nine o'clock. I am not sure.

Q. Was I present when they first came to the office?

A. When they first came to the office?

Q. Yes.

A. No, you wasn't there.

Q. Did I come down later that night?

A. Yes.

Q. What time was it, if you remember?

A. That was the night he made his confession?

Q. Yes, that was the night he made his confession. To [fol. 154] refresh your memory, I will ask you if it was not around ten o'clock?

By Mr. Belden: Now we object to him leading his own witness.

By the Court: Don't lead him.

A. He isn't leading.

Q. What time was it?

A. The best I remember, seems to me like it was around nine o'clock, when we came to your office. It must have been an hour or a little longer before you came, to the best of my memory.

Q. Were you present when I interrogated the witness at that time, or at any time that I interrogated the witness?

A. No, I was not.

Q. Did you strike the witness?

A. I never did.

Q. Did you ever see me strike him?

A. I never.

Q. Mistreat him in any way?

A. I never did.

Q. Did you ever see me strike him or mistreat him in any way?

A. You never did mistreat the man.

Q. Do you know what time it was that we left after he made his confession?

A. If I am not mistaken, around two o'clock, because I carried him back to the jail myself.

Q. Did you hear him make his confession?

A. I sure did.

Q. Who was present when he made that confession?

A. The first time he made it before you and me.

Q. Was anyone else present?

A. Not at that time.

Q. When he made that confession did he tell you and me where he put that axe?

[fol. 155] A. He sure did.

Q. Did he tell you and me where he put those shells?

A. He sure did.

Q. Did we hit him at any time?

A. No sir.

Q. Did we strike him?

A. No sir.

Q. Was he threatened or intimidated at any time?

A. He sure was not.

Q. Did he have marks of violence on him?

A. He didn't.

Q. Did W. D. Lyons on that night have a black closed eye?

A. He sure didn't.

Q. Did you go to the penitentiary when they took him?

A. No, I didn't.

Q. Do you remember who took him?

A. Yes.

Q. Who?

A. Van Raulston and Roy Marshall.

Q. Did you ever see Van Raulston hit this defendant?

A. He was not able.

Q. Why?

A. He had about three or four broken ribs. He never did touch the defendant.

Q. Did you ever see Roy Marshall strike him?

A. He did not.

Q. Did you ever at any time see him knock him down and hit the back of his head against the wall?

A. I never.

Q. And kick him in the ribs?

A. I sure didn't.

[fol. 156] Q. Was Mr. Cheatwood present?

A. Yes.

Q. Carrying on the interrogation in the county attorney's office?

A. Was Cheatwood there?

Q. Yes.

A. He wasn't in there while you and I were in there.

Q. Was he beaten at any time you were in the county attorney's office?

A. I never did see the man beaten.

Cross-examination:

By Mr. Marshall:

Q. You have been in the court room during this hearing, have you not?

A. I sure have not.

Q. You have not?

A. I have not.

Q. Did there come a time during any of the time while Lyons was under arrest that you stopped any officers from beating him?

A. I did not.

Q. Now, on the night he was arrested, did they bring him to your office first?

A. He was in my office when I came in. I was looking for him.

Q. Did he have a scar on the forearm?

A. He didn't have.

Q. Could he have and you not see it?

A. Yes.

Q. Did he have a black eye?

A. He didn't.

Q. Did you see any of the officers strike him?

[fol. 157] A. I don't remember, if I did.

Q. After you think a minute, would your answer be the same?

A. If I did, I don't remember. I walked in and told the boys I wanted to talk to him myself.

Q. Could it have been possible for some officer to strike him in your presence and you not see him?

A. Could have.

Q. In your presence?

A. I could have not been looking.

Q. Did you hear any licks struck?

A. No, I never.

Q. Did the officers have out a blackjack while you were present and in the presence of Lyons?

A. Well, I don't know. It is kind of customary for them to carry them with them.

Q. I mean in their hands?

A. I don't remember?

Q. You don't remember?

A. No.

Q. You say positively that no officer struck Lyons in your presence?

A. I didn't see them.

Q. Can you answer the question yes or no?

A. I said if they did, I didn't see them. Because there was a crowd around there.

Q. Were you up stairs on the second floor on the night that Lyons was arrested, the second floor of the jail when Lyons was there and several other officers?

A. No, I was not.

Q. After that where was he taken?

A. That night?

Q. That night.

[fol. 158] A. I couldn't say, because I told you I wasn't here when they arrested him. I was out looking for him.

Q. Where was the first time you saw Lyons?

A. In my office.

Q. What happened there?

A. I questioned him there?

Q. What else happened, if anything?

A. There was a bunch talking to him.

Q. About how many?

A. I don't know. There was two or three, I think, and I told them I would like to talk to him myself. I sat down and talked to him a long time.

Q. What did you question him about?

A. This murder.

Q. What, if anything, did he say?

A. He didn't say much of anything.

Q. Then what happened?

A. I put him back in jail.

Q. What time was that, if you know?

A. I don't remember.

Q. About how long did you question him?

A. I imagine I questioned him around thirty minutes.

Q. And carried him up stairs?

A. Carried him to the jail.

Q. Did you go up and get him again?

A. No sir.

Q. Did anyone else get him that you know of?

A. He wasn't bothered.

Q. Could anybody have gone up and got him and you not have known it, one of your deputies for example?

A. I don't think so. One was with me and the other was sick.

Q. And it is not possible that anyone could have taken [fol. 159] him out of that room and questioned him more?

A. If they did, I didn't know it.

Q. It would have been possible for someone else?

A. The County Attorney could have talked to him.

Q. About eleven days later, for the purpose of the record, on the day you refer to as the time he made his confession, were you there when he was taken out the first time? Did you go and get him?

A. I don't think so.

Q. You are positive that you saw him?

A. The second time?

Q. The second time.

A. Yes, I saw him.

Q. Where?

A. In the County Attorney's office.

Q. For the purpose of the record, can you estimate the size of that room?

A. The County Attorney's office?

Q. Just estimate it generally?

A. I imagine it is about sixteen feet square, fourteen or sixteen.

Q. How many men were in there?

A. Well, I don't know for sure. There were four or five, I think.

Q. Weren't two State troopers there?

A. State troopers?

Q. State highway patrolmen.

A. They were there, might have been in and out during the night.

Q. Were there two deputies in and out during the night, men connected with your staff? How many men on your staff were in and out during the night?

[fol. 160] A. I think just one, I am not sure.

Q. Do you know who that was?

A. I think it was Mr. Brown that was in there some of the time.

Q. Was the special agent for the Railroad in there, the special detective?

A. No.

Q. He wasn't in there at all that night? Are you positive?

A. That is right.

Q. Who else was there, as you remember? Was the assistant County Attorney there?

A. Yes, I think Mr. Gee was there a part of the time.

Q. And a part of the time the County Prosecutor was there?

A. Some times.

Q. You were?

A. When Mr. Horton came down, he was there then the biggest part of the night.

Q. And you were there?

A. Most of the time.

Q. Where was Lyons during that time?

A. He was in there.

Q. Where was he? In a chair or standing?

A. Sitting in a chair.

Q. Was Mr. Cheatwood there?

A. He was there a part of the time.

Q. Did you see Mr. Cheatwood strike him with anything?

A. Never saw him strike him with anything.

Q. Or anybody threaten him in any way, if he didn't talk what would happen?

A. I don't remember.

Q. You are not clear at all about what happened, are you?

A. I wasn't there all the time.

[fol. 161] Q. I am only speaking of the time you were.

A. I never saw anybody threaten him with anything while I was there.

Q. Did you go out with him to the jail?

A. I think me and somebody else went with him to the jail.

Q. Did you have to help him?

A. I don't think so.

Q. Did you help him?

A. No.

Q. Did you help him out of the chair before you started?

A. No.

Q. Didn't see any sign on his face?

A. He didn't have any sign on his face.

Q. Did there come a time when you had a picture taken with him near the jail?

A. Yes.

Q. Would you recognize that picture if you saw it again?

A. I should think so.

Q. May I show you?

By Mr. Horton: Are you going to offer it?

By Mr. Marshall: I want to see if it is the picture that was taken.

By Mr. Horton: Do you intend to offer it in evidence?

By Mr. Marshall: Afterwards.

By Mr. Horton: We object to the sheet of sensational magazine being offered in evidence.

By Mr. Marshall: I want to find out from the witness if this is his picture, No. 1, he testified he had a picture taken, and I want to ask him if that is the picture. That

is the nearest we can get. We are unable to get the actual picture.

By Mr. Horton: There is nothing authentic about it.

By Mr. Marshall: The nearest we can get. We can't [fol. 162] get the original of it.

By the Court: You may ask the sheriff if this is the picture he had made.

By Mr. Marshall: He can certainly identify his own picture. He can identify the reprint.

By Mr. Horton: This is a magazine illustration.

By Mr. Belden: May we ask the witness if that picture truly represents the situation there when it was taken? Nobody is better than this witness to know if that is a true picture of what was there.

By Mr. Marshall: If it truly represents the condition that existed, we are entitled to it.

By the Court: The testimony has been that a picture was made.

By Mr. Horton: We except.

By the Court: Exception allowed.

Q. I show you Defendant's Exhibit Two. Mr. Harmon, I ask you if Defendant's Exhibit Two is a reprint of the picture you just mentioned?

A. I don't know.

Q. Do you know these three people shown on the reprint?

A. I can't tell very much about it.

Q. Do you know who this is?

A. Looks a little like me but there are several fellows here that favor me.

Q. Who does that look like in the middle?

A. These negroes look nearly alike to me, can't hardly tell them apart.

Q. Does that look alike over there?

A. No way to tell.

Q. You can't identify the person on the left?

A. No. I said it looked like me.

[fol. 163] Q. You are not positive?

A. I am not positive.

Redirect examination.

By Mr. Horton:

Q. Did you ever see that picture before, that piece of paper?

A. I saw it in the magazine.

Q. What magazine?

A. I don't remember. I saw it at the penitentiary.

Q. You don't know what magazine it was?

A. No.

Q. Is that a magazine picture?

A. That is what they said it was.

Recross-examination.

By Mr. Belden:

Q. Now, you did, you, Mr. Cheatwood, and the defendant, W. D. Lyons, did have you picture taken out in front of the jail, didn't you?

A. Yes.

Q. Where was Mr. Lyons—the defendant standing with regard to where you stood and to where Mr. Cheatwood stood?

A. He was between us.

Q. He was between you?

A. Yes.

Q. On which side did you stand of this defendant?

A. I couldn't say for sure.

Q. You were on one side and he was on the other and that is the way this picture shows, isn't it?

A. He was standing between us.

Q. In a manner similar to what this picture shows? Would you say that that is not you?

A. I didn't say it wasn't me.

[fol. 164] Q. What is your honest opinion?

A. I said it looked like me.

Q. Does it look like W. D. Lyons?

A. I said I can't tell these negroes apart.

Q. Does that look like Mr. Cheatwood?

A. It resembles him some. You see that shades him.

Q. What is this here?

A. It looks like a shadow.

Q. Isn't that an axe shown in the picture?

A. It looks like an axe of some kind.

By Mr. Marshall: Please the Court, we will leave this but do not offer it in evidence for the reason that the witness has refused to identify positively his likeness. We would like to use it at some time when we can put it to better use. We will withdraw it at this time.

By the Court: All right.

By Mr. Horton:

Q. As sheriff, did you have your picture taken on more than one occasion?

A. I think it was twice.

Q. Not only in this case, but in others?

A. Yes.

Q. You don't know whether that is authentic reproduction of any picture taken of you or not? Of your own knowledge, do you know where that came from?

A. I do not.

By Mr. Marshall:

Q. Mr. Harmon, is W. D. Lyons in the court room now?

A. W. D. Lyons? Yes.

Q. Can you point him out?

A. Yes.

Q. Where is he?

[fol. 165] A. Sitting over there.

Q. I thought they all looked alike.

A. You get to where you know them.

Q. But you can't identify him on this picture?

A. That picture don't favor him anyway.

Q. As I understand, your testimony is that you did not see Lyons struck at all by anybody?

A. I sure didn't.

Q. You didn't see him struck with a strap?

A. I sure didn't.

Q. With a hand?

A. No.

Q. With a blackjack?

A. I didn't.

Q. Did you ever mention to Lyons the possibility of a mob doing anything?

A. Did I ever mention what?

Q. Anything about a mob doing anything to him?

A. There was something said about, I believe, I am not sure, about the National Guard being here, and I told him I was afraid there might be trouble.

Q. Was that before he confessed?

A. No.

Q. When was it?

A. I think it was the time we had the examining trial.

Q. The preliminary hearing?

A. Yes. I think that is when it was, but I am not sure.

Witness Excused.

[fol. 166] FLOYD BROWN, in behalf of the State of Oklahoma, in the absence of the jury, after being duly sworn, testified as follows, to-wit?

Direct examination.

By Mr. Horton:

Q. What is your name?

A. Floyd Brown.

Q. You are a former deputy sheriff in Choctaw County?

A. Yes.

Q. Do you remember, Mr. Brown, the night that W. D. Lyons confessed to killing Elmer Rogers and his wife and child?

A. Yes.

Q. Where was that first confession made, if you remember?

A. In the County attorney's office.

Q. Was he being beaten at the time he made that confession?

A. He was not.

Q. Were you present when I asked the other men to step out while I talked to him?

A. I was standing in the door, fixing to come down stairs, I heard you say it, the only time.

Q. Did you come back?

A. Yes.

Q. Who was present when you came in?

A. You and Roy Harmon, and Howard Rorie, and I believe Harvey Hawkins, and seems like Mr. Holmes.

Q. Did you hear him repeat the confession to you and the other men?

A. I heard him tell the whole thing.

Q. At that time, before he was taken to the scene of the crime the next morning, did he tell where he threw the axe?

A. Yes.

Q. Where did he say?

[fol. 167] A. He said he put it under the east side of the house.

Q. Did he tell where he threw the shells?

A. Yes.

Q. Where did he say he threw the shells?

A. He said he threw them somewhere around a half a mile from the house.

Q. Did he tell the direction he ran after he committed the crime and set the house on fire?

A. He said down the fence row about a hundred yards and turned kind of southeast.

Q. Did he run down the railroad?

A. Yes, that is south.

Q. That is what he told you and me and the other men present that night?

A. Yes.

Q. Was he being beaten when he did that?

A. He wasn't.

Q. Did you ever knock him down and kick him in the ribs?

A. I sure didn't.

Q. Did you ever beat him continuously with a blackjack?

A. I did not. I never did hit him.

Q. Did you ever hit him at all?

A. I never did.

Q. Did you ever hit him in the jail?

A. I did not.

Q. Did you ever hit him in the little office in the jail?

A. I never did hit him.

Cross-examination.

By Mr. Belden:

Q. You were a former deputy sheriff in this county?

A. Yes.

[fol. 168] Q. You testified in the preliminary hearing?

A. Yes.

Q. Now, you were present in the county attorney's office the night you say you obtained the confession?

A. I was there right after he told the first of it, and I walked in. I heard him say something about it about the time I raised up to go out. When I came in I heard it.

Q. Three could have been a lot of things happen that you didn't know about?

A. I was out but a few minutes.

Q. What hour did you go there?

A. I was in there all the time nearly.

Q. What hour did you first go up there?

A. I imagine nine.

Q. You were there until when?

A. I don't remember. It was late.

Q. Your best judgment?

A. I would say around twelve or one o'clock.

Q. It might have been later than that?

A. Could have been, yes.

Q. Was anyone still there when you left the next morning?

A. Up stairs?

Q. Yes.

A. Well, I left to get Van Bizzell. I believe they took this boy back to jail.

Q. What time did you leave to get Van Bizzell?

A. I don't remember, but a little while afterwards.

Q. Your best judgment?

A. I think around two o'clock.

Q. And they were still up stairs?

A. I know the boy had been put in jail.

[fol. 169] Q. Are you sure of it?

A. I am pretty sure.

Q. You didn't see him taken down, did you?

A. Seems like I did, yes.

Q. Would you swear to that?

A. No, I wouldn't swear to it.

Q. The County Attorney asked the defendant if it wasn't just a strap that was being used to whip him instead of a blackjack as the defendant testified.

A. That I hit him with?

By Mr. Horton: I object. I didn't ask him whether he had been whipped. I asked him if he wasn't tapping him on the knee.

By Mr. Belden: The County Attorney asked, "Didn't I stop them from whipping you." He used that word himself. We challenge the record on that.

By Mr. Horton: I said if he was whipped, I stopped them from tapping him on the knee.

Q. Did you see this leather strap that the County Attorney talked about being used to tap him on the knee?

A. I never did see him whipped up there. I did not.

Q. You did not see this strap?

A. I did not.

Q. Were you there all the time?

A. No, I was not there, all the time.

Q. How much of the time were you gone?

A. I went to the telephone two or three times. The telephone would ring and I would go. That was early. Every once in a while I would step outside of the door, but I wasn't gone any length of time.

Q. Do you remember what your testimony was when you were on the stand in the preliminary?

A. Yes.

[fol. 170] Q. You have refreshed your mind, have you?

A. I have refreshed it?

Q. Yes.

A. About W. D.?

Q. About what you testified.

A. I know what I said.

Q. When was the last time you read it over?

A. I read it today.

Q. And you know—

A. I know what I said.

Q. What did you say about any beating?

A. Bob Warren was the lawyer at the other trial. He asked me about Van Bizzell, about Van, did he get a black eye up there, I said he didn't get a black eye up there. He asked if he wasn't cursed and abused up there, and I said he was. He says, was he slapped, and I said, yes, he was slapped.

Q. And you said you saw some slapping going on?

A. Yes.

Q. What do you mean by slapping?

A. Slapping, just like you get slapped.

Q. What with?

A. Hand, open hand.

Q. Who did that?

A. Cheatwood did it.

Q. You mean he used his open hand and slapped a colored—

By Mr. Horton: We object to that testimony. It does not go to this defendant. He said he saw Van Bizzell slapped.

By the Court: It may be admitted for the purpose of corroboration.

By Mr. Horton: Exception.

By the Court: Exception allowed.

[fol. 171] Q. You say Mr. Cheatwood, a white man, slapped a colored man on the head with his bare hand?

A. Yes sir.

Q. And you did not see Mr. Cheatwood with a blackjack?

A. I didn't.

Q. Did you ever see the blackjack he has?

A. No sir, I never did.

Q. Never did see him with a blackjack?

A. I don't believe I ever did.

Q. At this time, you say it was Van Bizzel that you saw being slapped?

A. Yes sir.

Q. Mr. Brown, did you see the defendant, W. D. Lyons, in the county attorney's office, sitting in a chair, with the County Attorney sitting, asking him questions, when Cheatwood was on one side, you on one side, Reason Cain at his back?

A. No, sir, I never asked him a question in this whole case.

Q. What officers were present in the county attorney's office that night?

A. Roy Harmon was there.

Q. Who else?

A. Well, I believe Reason was there.

Q. Reason Cain, the Frisco agent, or officer?

A. Yes, and Mr. Horton.

Q. Who else?

A. I believe Harvey Hawkins was there.

Q. The highway patrolman?

A. Yes.

Q. And who else?

A. That's about all that I remember being there.

Q. You don't remember the other highway patrolman in [fol. 172] this district being there that night?

A. No, I don't.

Q. I will ask you if it is not a fact that while you were trying to get a confession out of W. D. Lyons that they put a pan of bones in his lap?

A. Yes sir.

Q. That was before the confession?

A. Yes sir.

Q. And if he was not told that those were bones of Mr. and Mrs. Rogers?

A. I believe he was.

Q. Why did they put the pan of bones in his lap?

A. I don't know. I didn't put them there. I figure it was to get him to thinking about what he did.

Q. You were trying to get a confession, weren't you?

A. That was the purpose of it, yes.

Q. And you know that most colored people are superstitious and afraid of the dead, and that was the purpose of putting those bones in his lap, was to frighten him, wasn't it?

A. Well, I don't know. Some of them don't frighten very easily.

Q. But that was the purpose, wasn't it?

A. I wouldn't say that was the purpose, but it might help a good bit.

Q. And in your opinion, with a good many colored people, that would help, wouldn't it?

A. Yes, and a few white people, too.

Witness excused.

[fol. 173] HARVEY HAWKINS: in behalf of the State of Oklahoma, in the absence of the jury, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. Your name is Harvey Hawkins?

A. Yes.

Q. What position do you hold?

A. Highway patrolman.

Q. Were you stationed at Hugo in January, 1939?

A. Yes.

Q. Do you remember when this defendant was brought to the office of the county attorney for questioning?

A. I do.

Q. Were you present on that night when he made his confession?

A. I was present a great deal of the time.

By the Court: For the purpose of the record, January, 1940.

Q. January, 1940. I beg your pardon. Did you beat him at that time?

A. I did not.

Q. Did you knock him down onto the floor, and kick him in the ribs?

A. No.

Q. Did you go to the jail house and beat him?

A. No.

Q. Did you beat him against the wall of the sheriff's office?

A. No.

Q. Did you beat him continually with a blackjack?

A. I did not.

[fel. 174] Cross-examination.

By Mr. Belden:

Q. You are a highway patrolman?

A. Yes.

Q. And took a great deal of interest in this case?

A. Yes.

Q. As highway patrolman, what are your duties?

By Mr. Horton: We object as incompetent, irrelevant and immaterial.

By the Court: Overruled.

A. As any other peace officer in the State, our duties are primarily interested in traffic regulation, but we may be called out on any other service.

Q. Were you called out?

A. Yes.

Q. By whom?

A. I received a long distance telephone call.

Q. From whom?

A. The call came to me for the sheriff, in an attempt to locate the sheriff. Later in the night I was called from the scene of the crime by Van Raulston, deputy sheriff at that time.

Q. He called you?

A. For assistance.

Q. Mr. Hawkins, you say you were present in the county attorney's office that night when this purported confession was obtained?

A. Yes.

Q. From what time to what time?

A. I was present about an hour or two around early in the evening, some time before nine o'clock.

Q. Some time before nine o'clock?

[fol. 175] A. Then I was gone about two hours and a half to cover an accident that come to me from east of Millerton, on U. S. Highway No. 70.

Q. What time did you leave the next morning?

A. About daylight.

Q. You left the office somewhere about daylight the next morning?

A. Yes.

Q. You went there the first time some time before nine o'clock?

A. Yes sir.

Q. And you were there how long?

A. I was there an hour or two.

Q. During that time what was going on?

A. The men were questioning the defendant concerning this case.

Q. What men, Mr. Hawkins?

A. The county attorney was present, I was present, the assistant county attorney, Vernon Cheatwood.

Q. That is the Governor's special investigator?

A. That is right, Floyd Brown, the under sheriff, I don't recall anyone else, but the sheriff was.

Q. Was Reasor Cain there, to refresh your mind?

A. I don't recall definitely about that.

Q. During that hour and a half around nine o'clock, that you were there, they were questioning him?

A. Yes.

Q. And you got back after about two hours?

A. Something like that, probably longer than that.

Q. And from that until daylight they were still questioning him?

A. No, not that long. They were not questioning him all that time.

[fol. 176] Q. What were you doing?

A. We were waiting until daylight came until we could hunt the axe he told us about.

Q. Were you there when he is said to have confessed?

A. I was.

Q. What time was that?

A. Rather late, about midnight, the best I recall. I had not slept much, and the hours didn't mean much just then.

Q. The County Attorney has referred to a strap being used by Mr. Cheatwood, hitting the defendant on the knees and legs. Did you see that?

A. I did not.

Q. That did not take place before you?

A. I- did not.

Q. Did you see the blackjack being used that night?

A. I did not.

Q. Did you see anything being used?

A. I did not see anything being used.

Q. Did you hear any threats?

A. No.

Q. Early in the night until some time the next morning, you say they were questioning him all that time?

A. I don't know about all that time. I don't know that the questioning lasted so many hours. I was out quite a bit.

Q. After you got back, were they still questioning him?

A. A part of that time was taken up in making the statement, he was making the statement.

Q. What time would you say they got the statement?

A. I previously testified to that a minute ago.

Q. Do you mean they wrote that statement up there at that time?

A. Yes.

[fol. 177] Q. Who took it?

A. I don't recall. He made the statement to the County Attorney.

Q. But you don't know who took it. That is all.

Re-direct examination.

By Mr. Horton:

Q. You say he made the statement around midnight, to your best recollection?

A. To my best recollection, it was, might have varied some.

Q. I will ask you if before you took him to where he said that where he put the axe, he was not taken back to the jail?

A. Yes, for some time.

Q. Did you come in when he made his statement in my office?

A. Yes.

Q. Who was present when you came in?

A. You and I, and Mr. Cheatwood.

Q. Didn't I ask all the men to step out of the office, that I thought the defendant would talk to me?

A. You did.

By Mr. Belden: We object to the form of the question.

By the Court: It is leading.

Q. What happened with reference to that?

A. Several left the office at that time.

Q. Did they come back in?

A. Yes.

Q. Did this defendant then make his statement about the axe?

A. Yes.

Q. And the shells?

A. Yes.

Q. Did he tell where they were?

A. Yes.

[fol. 178] Q. And later the next morning was he taken out of the jail and taken to where he said they were?

A. Yes, about daylight.

Q. Did you go?

A. Yes.

Q. Did he take you to where the axe was?

A. Yes.

Q. Did he take you to where the shells were?

A. I did not go with him across the pasture to the shells.

Q. Did you know where that axe was before he told you?

A. I did not.

Q. Had we been looking for the axe?

A. We had.

Q. For how long?

A. Twenty-seven days.

Q. Was that the first time you had any intimation as to where it was concealed?

A. That is right.

Q. How did you get that intimation?

A. From the defendant.

Q. Did he tell you where it was?

A. Yes.

Q. Where did he tell you?

A. About two or three feet south of the window, and back under the house, a little over the length of the axe handle. That was the window in the east end of the house.

Q. How did he tell you he put the axe under the east end of the house?

A. He said he shoved it straight under there, and swung the handle around, and that the blade would be lying lengthwise with the house.

[fol. 179] Q. The blade would be pointing east and west?

A. Yes.

Q. Was that the way it was pointing when you took it up?

A. It was.

Re-cross examination.

By Mr. Belden:

Q. Where was the defendant—strike that. Did you take up the axe?

A. I did.

Q. You were the one doing the digging?

A. Yes.

Q. How deep did you dig?

A. Approximately six inches.

Q. Then what?

A. I took up the axe right underneath the ashes *the* collected there from the burning of the house.

Q. Was it where the house had been?

A. It was.

Q. Now, Mr. Hawkins, you are just as sure of that statement as any other statement you made?

A. I am.

Q. You dug down six inches?

A. Approximately.

Q. I will ask you if it is not a fact that there were not any ashes whatever where the house had been? That they had all been raked away, and clear back some distance from where the house had been?

A. No, the ashes were there, and the foundation of the chimney, the only marking that sat solid where the house was sitting, in the middle of the west end of the area covered by the ashes.

Q. I will ask you if you didn't dig a hole six inches deep down into the earth and not into the ashes?

[fol. 180] A. No the hole was in the ashes.

Q. You are saying that you did not dig into the earth?

A. I am.

Q. How was the axe lying?

A. Flat on the ground, the blade lying east and west, the back part of the blade, where the handle enters, was pointing south, the other side of the axe was pointing north. In that axe were the charred remains of the axe handle that had been burned up, and in that was the small piece of sickle blade that would be used in the split in the handle to hold that in the axe. The axe was lying under the house. Under most any house there is that loose, fine dirt that would collect in occasional sinks in the ground, made or caused by chickens, kind of in the middle of one of those. It was lying in the dirt and covered by the ashes. I dug through the ashes and turned the axe over with a shovel I got out of the patrol car.

Q. Who was present when you got the axe?

A. Floyd Brown, the undersheriff, and the defendant.

Re-direct examination.

By Mr. Horton:

Q. Did you go to where this house burned, the night before?

A. I did.

Q. Did you get there before they moved the bodies?

A. No.

Q. Do you recall of a crowd of people being there?

A. Yes, there was.

Q. Were they tramping over this ashes and debris?

A. Not while I was there.

Q. Do you remember what the condition of the *whether* was the following week and until the axe had been found?

A. We had two snows, two hard freezes. There was a hard freeze when we dug up the axe, froze hard.

[fol. 181] Q. Had there been some water poured over that spot?

By Mr. Marshall: Court Please, this leading is getting beyond all benefit, and has been going on for the last few minutes, was there any water that had been poured on the ground, and no answers but yes or no.

By the Court: Can't you refrain from leading questions?

Q. Where you there when the undertaker got the bodies?

A. I was not.

Q. Was the house still burning?

A. It was.

Q. Was there any effort made to put out the fire?

A. Yes.

Q. Was any water used?

A. Yes.

Q. Was it cold that night?

A. It was a rather cool night. It was not freezing.

Q. Do you remember when it started freezing after that?

A. No, I don't. It rained within the next two or three days, but when it began to freeze, I do not remember.

Q. Did it drizzle immediately after that day?

A. Yes.

Q. And did it freeze?

A. Yes.

Recross-examination.

By Mr. Belden:

Q. You say they used water trying to put the fire out?

A. Yes.

Q. Who did?

A. Several persons that were around there.

Q. Can you name them?

A. I can't recall, but a number of local people, Fort Towson citizens. I might not know their faces. I don't know all the people down at Fort Towson.

Q. What was the state of the house and the fire when you got there?

A. Burned down.

Q. Already burned down?

A. Yes.

Q. You didn't see anyone trying to put out the fire after it was burned down?

A. Yes.

By Mr. Horton:

Q. Explain what you mean by that, Mr. Hawkins?

A. The embers and stuff were being extinguished for the purpose of looking for anything that might be found as evidence.

Q. Were they looking for evidence then?

A. Yes.

Witness excused.

VAN RAULSTON, in behalf of the State of Oklahoma, in the absence of the jury, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. What is your name?

A. Van Raulston.

Q. What position did you hold last January, 1940?

A. Deputy sheriff.

Q. Do you know this defendant?

A. Yes.

Q. Do you remember the occasion when he was taken to the penitentiary at McAlester?

[fol. 186] A. Yes.

Q. Who took him up there?

A. Roy Marshall and I.

Q. What time of day or night did you get there?

A. Just about dark.

Q. That was the day following the night he made his confession in the county attorney's office?

A. It was.

Q. Where did you take him when you got there?

A. To the warden's office.

Q. That night?

A. Yes.

Q. Was the warden present?

A. He was.

Q. Did you beat him?

A. No sir.

Q. Did the warden beat him?

A. No sir.

Q. Did Roy Marshall beat him?

A. No.

Q. Were you present all the time that the warden talked to him?

A. I was.

Q. Did you threaten to beat him?

A. No sir.

Cross-examination.

By Mr. Belden:

Q. You were at that time a deputy sheriff?

A. Yes sir.

Q. Did you have a blackjack with you?

A. I didn't carry a blackjack.

[fol. 184] Q. And didn't have one at the penitentiary?

A. I sure didn't.

Q. And did not use one on the defendant?

A. No sir.

Q. Were you present in the county attorney's office the night of the purported confession?

A. I was not.

Q. And you don't know anything about that?

A. No sir.

Q. Did you hear any threats made to this defendant where he was told by the warden what would happen to him if he didn't confess?

A. The warden told him the statement he was about to make would be used against him in court. That is what the warden told him.

Q. Did the warden tell him what would happen to him if he didn't?

A. The warden didn't threaten him.

Q. Will you answer yes or no? Did the warden tell him what would happen to him if he didn't make a confession?

Answer yes or no.

A. No.

Q. After you left the warden's office, do you know where they took him?

A. No.

Q. You know nothing about that?

A. No.

Q. Did you hear the warden tell him about the electric chair, and how many men had been electrocuted?

A. No.

[fol. 185] Re-direct examination.

By Mr. Horton:

Q. Did he make a statement at that time in your presence and in the presence of Roy Marshall and Jess Dunn about this crime?

A. He did.

Q. Did you see him sign his name?

A. Yes.

Q. Was that his name or did the chaplain sign his name?

A. Signed his own name.

Q. Did he put his thumb print on every page?

A. He sure did.

Q. Was he forced to do it?

A. He was not.

Q. Did anybody take his hand and make him put his thumb print on the page?

A. No.

Q. Did Mr. Dunn threaten him with the electric chair before he made that statement, or before he signed it?

A. No, he did not.

Q. Was the electric chair anywhere in the proximity of the place of the conversation with him?

A. No, the electric chair was not mentioned.

Witness excused.

[fol. 186] ROY MARSHALL, in behalf of the State of Oklahoma, in the absence of the jury, after being duly sworn, testified as follows to wit:

Direct examination.

By Mr. Horton:

Q. State your name.

A. Roy Marshall.

Q. Where do you live?

A. Hugo.

Q. What business are you in?

A. Barber.

Q. Do you remember when the Rogers family was murdered?

A. Yes.

Q. Do you know the defendant, W. D. Lyons?

A. Yes.

Q. Do you remember the occasion when he was taken to McAlester in January, 1940?

A. Yes.

Q. Do you know who took him?

A. Van Raulston and myself.

Q. Anybody else present?

A. No.

Q. Did you go to the penitentiary with him?

A. Yes.

Q. Where did you take him when you got there?

A. To the warden's office.

Q. That is Mr. Dunn's office?

A. Yes.

Q. Were you present when he made a statement about this case there?

A. Yes.

[fol. 187] Q. Was he being beaten at that time?

A. No.

Q. Did you ever strike him?

A. No.

Q. Did Van Raulston ever strike him?

A. No.

Q. Did Mr. Dunn ever strike him?

A. No.

Q. Did they threaten him with the electric chair?

A. No.

Q. Who was present in Mr. Dunn's office when that statement was made?

A. Me and Van and Mr. Dunn, the reporter, and I don't know of any one else.

Q. Did you see him sign the statement?

A. Yes.

Q. Did he sign his name on each page?

A. Yes sir.

Q. Did he sign his name or did the chaplain sign it for him?

A. He signed it.

Q. He signed his own name?

A. Yes.

Q. Was his thumb print on each page?

A. Yes.

Q. Was he forced to put his thumb print on it or did he put it on himself?

A. He put it on himself.

Cross-examination.

By Mr. Belden:

Q. You say you were present all the time in the warden's [fol. 188] office, and you say that Van Raulston didn't beat him?

A. Yes.

Q. How did he come to sign his name? Tell what took place.

A. When he made the statement Mr. Dunn asked him if he knew his rights, and he said he did. He had been there before. And that the confession could be used, and he said yes. He asked him if he wanted to make a statement, and he told Mr. Dunn that he did.

Q. You never knew of any threat, threatening language or cursing or abuse?

A. No sir, there wasn't any in that office.

Re-direct examination.

By Mr. Horton:

Q. Mr. Marshall, are you a peace officer?

A. No.

Q. Were you at that time?

A. No.

Q. Do you have any interest in the outcome of this case?

A. No.

Q. Did you at that time?

A. I drove the car for Van. Van had been in a wreck.

Q. Was Mr. Raulston crippled at that time?

A. Yes.

Q. And Mr. Dunn advised him about his rights?

A. Yes.

By the Court: (Q) So the Court will be advised, how did this come about: How did they do it? Did the defendant say, "I want paper to make a confession?"

A. No, we went into the office and Mr. Dunn asked him whether he wanted to make a statement. He had made statements there. Mr. Dunn asked him whether he wanted [fol. 189] to make a statement and tell the truth about, and he said he did.

By the Court:

Q. Who asked the questions?

A. Mr. Dunn.

Q. And he answered of his own free will?

A. Yes.

Q. Did he call for pen and ink to sign it?

A. They got the pen and ink.

Q. Did someone hand him the pen and ink?

A. Yes.

Q. Did they tell him to sign his name?

A. Yes, he signed it.

Q. Did he say he wanted to make his thumb mark?

A. No, they had a pad and told him to sign it with that. He rolled his thumb and put it down on the paper.

Q. Did he seem to do that of his own accord?

A. Yes.

Q. You did not see any marks of violence in any way?

A. No, there wasn't any from Antlers until we got there.

Q. Was he scarred or bruised at Antlers when you got him?

A. No sir.

Q. No cut about him, on his face?

A. No sir, not when we got him.

Q. No eye swollen?

A. No sir, I didn't see it.

Witness excused.

By Mr. Horton: That is all we have to offer on the confession.

By the Court: Do you gentlemen desire to be heard on this?

By Mr. Marshall: Court please, the defendant would like to be heard on it.

By the Court: How much time do you want to the side?
[fol. 190] By Mr. Horton: A very short time for us.

By the Court: Fifteen or twenty minutes?

By Mr. Horton: That is plenty for us.

By the Court: Fifteen minutes to the side for argument.

By Mr. Belden: The defendant would like to put on some rebuttal witnesses.

By the Court: All right. Call the first witness in rebuttal in support of your motion.

By Mr. Marshall: If your Honor please, at this time we would like to call a State's witness.

ANNIE MAY FLECKS, in behalf of defendant, in the absence of the jury, after being duly sworn, testified as follows, to-wit:

Direct examination,

By Mr. Belden:

Q. You may state your name?

A. Annie May Fleeks.

Q. Are you related to W. D. Lyons?

A. Yes sir.

Q. What relation?

A. Sister.

Q. You knew of him being arrested and put in the jail here?

A. Yes sir.

Q. Did you see him while he was in the jail here?

A. Yes sir.

Q. Just tell the Court in your own words, if you observed him, whether or not you observed any licks about his body or face that he had been beaten.

[fol. 191] A. Yes sir, he had been beaten, all right.

Q. Tell the Court what you saw.

By Mr. Horton: We object to asking the witness for a conclusion. Let her tell what she saw.

By the Court: She may tell what she saw with reference to his condition.

By Mr. Horton: But she said he had been beaten.

By the Court: You may state what the condition of his face and his anatomy were.

A. Sir?

By the Court: What condition his face was in.

A. His eye was black.

Q. Which eye?

A. I don't know. I didn't pay no attention exactly which one it was.

Q. What else? Were there any other marks on him?

A. Yes sir, his arms was bruised.

Q. Did you look at his arms?

A. Yes sir, he showed them to me.

Q. What else?

A. His back was bruised.

Q. Did you look at it?

A. Yes sir, he showed it to me. He said his leg was bruised but we didn't look at that.

Q. You looked at his back?

A. Yes sir.

Q. And arms?

A. Yes sir, and his face.

Q. Did you look at his forehead?

A. No sir, I didn't pay any attention to that.

[fol. 192] Q. Did you observe how he got about, walked?

A. He couldn't hardly walk, He held to me and his wife, he was so weak.

Q. Where was he?

A. He was lying down in the jail. When we walked in he pulled up by us and walked.

Q. By who?

A. Me and his wife. He held to us and walked.

Q. He wasn't locked in a cell?

A. No sir.

Q. Was he in the women's ward or cell, or not?

A. I don't know which is the women's ward.

Q. Was any other men where he was?

A. No sir. He was on the south side.

Q. And no other men where he was?

A. No sir.

Cross-examination.

By Mr. Horton:

Q. When was that that you went up in the jail?

A. I didn't even pay no attention to the date.

Q. You noticed he had a black eye?

A. Yes sir.

Q. But you don't know which eye it was?

A. No sir. I didn't pay no attention to that.

Q. Did he tell you who had beaten him?

A. No sir, he didn't tell us anybody had beaten him.

Q. Did you ever see him beaten?

A. No sir.

Q. You never saw him beaten?

A. No sir.

Q. You don't know what had happened to him?

[fol. 193] A. No sir.

Q. You don't know whether his condition was critical, or serious, or not?

A. No sir.

Q. If he had bruises on him, you don't know how he got them, do you?

A. No sir.

Witness Excused.

By Mr. Belden: That is all we desire to offer.

By Mr. Horton: That is all.

By the Court: You may proceed with your argument.

Thereupon: Counsel for the defendant for the State argue to the Court the testimony adduced to the Court in the absence of the jury on the admissibility of State's Exhibit Nine, and after hearing said argument, the Court made its finding and ruling as follows, to-wit:

RULING AS TO ADMISSIBILITY OF CONFESSIONS

—By the Court: Let the record show that the Court finds that the defendant may have been frightened into making the confession that was made here in the court house, by long hours of questioning and by placing bones of the purported bodies of the deceased persons on his lap during the questioning. The first confession, made in the court house at Hugo is by the Court ruled out.

By Mr. Lattimore: We have not offered that in evidence.

By the Court: But there has been some talk about it. The second confession, made at McAlester, the Court finds that the weight of the evidence in that matter indicates that no threats were made, that no offer of leniency was held out, that the confession was made voluntarily by the defendant, and is admitted in evidence. To which show the exception of the defendant. The Court will take recess until nine o'clock in the morning.

[fol. 194] And thus ends the proceedings had before the Court in the absence of the jury on the admissibility of the purported confession made by defendant.

Thereupon: The jury is recalled, and placed in charge of sworn bailiffs of the Court for the night, and Court takes recess until nine o'clock tomorrow morning. And thereafter, to-wit, at nine o'clock, a. m., January 29, 1941, Court is reconvened as per order of adjournment, the jury being present and the defendant being present, whereupon proceedings were had as follows, to-wit:

JESS DUNN, in behalf of the State of Oklahoma, in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. Your name is Jess Dunn?

A. Yes.

Q. Are you the same witness who testified here yesterday?

A. Yes.

Q. Mr. Dunn, I hand you again State's Exhibit Nine, and ask you to state what that is.

A. This is a statement that W. D. Lyons made in the warden's office in the Oklahoma State Penitentiary. This is his signature which he written himself. This is his thumb print that he put on there himself.

Q. Is that signature and thumb print on each page?

A. It is on each page of the statement.

[fol. 195] Q. Was it signed voluntarily by the defendant, or was he forced to sign it?

A. Absolutely voluntary.

Q. Did you tell him his rights when he signed that statement.

A. I did.

Q. Detail just how the statement came to be signed and the circumstances surrounding it.

A. He and Van Raulston and a boy named Marshall came into my office along, I guess, about nine thirty in the evening, came in and sat down, and I talked to the boy. I knew him before he came up there. And I asked him had he told the truth about this case, and he said he hadn't. I asked did he want to tell the truth about this case, and he said he did. I asked him did he want to make a statement. He said he did. Then I told him his rights in the case. I told him what statement he made would be used against him, and for him not to make a statement unless he voluntarily wanted to and it would be his own free will, and voluntary if he made a statement. Then I asked him did he want to make a statement, and he said he did. And I asked him a few questions, then I called in my secretary and told him that I was going to take down what he said and asked him did he want to sign it. He said he did. After the statement was taken, he got up and signed those pages and put his thumb print on each page. All voluntary things, and the office was as quiet as this is now. He was as calm and cool as he is now. His treatment in my office was the treatment he has now in this court room.

Q. Where is your office located in the main building there?

A. It is in the northwest corner of the administration building.

Q. How many windows do you have in the office?

A. We have four windows.

Q. Was W. D. Lyons sitting down all the time you were [fol. 196] questioning him?

A. Yes, all except one time.

Q. What did he do then?

A. I had got down to the question of where he shot the man. I asked him the question of how far the man was from the window when he shot. He stood up from his seat and stepped off about two and a half or three feet from the window. I asked him where he shot the man. He put his thumb up there in the left side and said about there, and was just as cool and calm as he is right now.

Q. How long had he been there when you questioned him?

A. Before I taken the statement?

Q. Yes.

A. I will say something like 20 or 30 minutes. We sat and talked before I called my secretary in and had him to take the statement.

Q. He hadn't at that time been placed in a cell, had he?

A. No.

Q. Will you read that statement to the jury, Mr. Dunn?

A. I haven't got my glasses, if you will read it.

Q. Who was present, Mr. Dunn, at the time this statement was read to him?

A. Van Raulston and Mr. Marshall; and the chaplain of the penitentiary.

Q. Were they all present at the time you read the statement to him?

A. They were.

Q. And at the time he signed it?

A. Yes.

Q. And marked it with his thumb print?

A. That is right.

Q. Will it be all right for me to read the statement?

A. I can get some glasses.

Q. I will read it. We offer this confession in evidence. [fol. 197] By Mr. Belden: We want to object to the County Attorney reading from that, and I want to interpose an objection: Comes now the defendant and renews his objection to the introduction of the purported confession of the defendant for the reason that it is a denial of the Constitutional rights of this defendant, and of the Fourteenth Amendment to the Constitution of the United States as to due process of law.

By the Court: Overruled, exception allowed.

By Mr. Horton: Gentlemen, I will read you this statement and confession that has been offered and admitted in evidence, about which Mr. Dunn has testified.

STATE'S EXHIBIT No. 9

"Statement and Confession"

"I, W. D. Lyons, a negro, at 8:15 o'clock P. M., on this the 23rd day of January, 1940, in the office of Warden J. F. Dunn at the Oklahoma State Penitentiary at McAlester,

in the presence of J. F. Dunn, Warden of the Oklahoma State Penitentiary, Mr. Van Raulston, Deputy Sheriff of Choctaw County, Oklahoma, Mr. Roy Marshall, a citizen of Choctaw County, Oklahoma, and a stenographer, do of my own free will and accord, without threat of punishment, duress, fraud, coercion, promise of leniency or of any consideration whatsoever, or reward, do hereby and hereon make the following statement and confession, which statement and confession I swear to be the whole truth, without reservation:

Interrogatories by Mr. J. F. Dunn:

Q. State your name?

A. W. D. Lyons.

Q. Where do you live?

A. Hugo, Oklahoma.

[fol. 198] Q. How long have you lived down there?

A. I have lived down there mostly at Fort Towson.

Q. How long have you lived around Fort Towson?

A. All my life.

Q. Were you ever convicted of any crime and sent to the penitentiary?"

By Mr. Belden: We object to any testimony referring to any other crime.

By the Court: It is permissible to ask a witness if he has been convicted of a felony and that is as far as you can go, so far as it would be admissible.

By Mr. Horton: All right. I will omit that part.

By the Court: All right.

By Mr. Belden: I ask the Judge to admonish the jury not to consider that statement.

By the Court: Gentlemen, you will not consider any reference in that statement to previous servitude in the penitentiary.

Q. What have you been doing?

A. Working most of the time.

Q. Did you know a white man that lived around Sawyer, Oklahoma, by the name of Elmer Rogers?

A. I never knew his name was Rogers.

Q. Did you know where he lived.

A. Yes, I knew where the house was.

Q. Did you know he was the man that you talked to Vanzell about?

A. No, sir..

Q. You had been by his house?

A. I had been by his house.

[fol. 199] Q. How many times?

A. I went back and forth by his house several times.

Q. Where does Vanzell live?

A. Right out of Fort Towson.

Q. Did you see Vanzell on Saturday or Sunday evening before New Years?

A. Yes, I saw him at Fort Towson.

Q. Did you talk to him?

A. Yes, sir.

Q. What did you say to him?

A. I walked up to him and spoke.

Q. What was the conversation?

A. He asked me if I had a gun and I told him no.

Q. Then what else was said?

A. He told me if I had a gun that he knew where we would make some money.

Q. Then what did you say?

A. I told him I could get one.

Q. What else was said?

A. He told me to get it and meet him.

Q. To meet him where?

A. To start up the branch from Fort Towson.

Q. You knew who you were going to rob—that you were going to rob a man by the name of Rogers, a white man that Saturday evening?

A. Yes, sir.

Q. He is the man that you and Vanzell agreed to rob on Sunday evening, New Year's Eve night?

A. Yes, sir.

Q. Where did Vanzell tell you to meet him?

A. Straight up the road on the branch from Fort Towson.

[fol. 200] Q. What time did you agree to meet him?

A. About dusk—on Sunday evening, December 31, 1939.

Q. Where did you go then?

A. Stayed around Fort Towson.

Q. What time did you leave there Saturday?

A. I stayed there all night.

Q. Did you get the gun then?

A. No.

Q. When did you get it?

A. Sunday morning.

Q. Did you pass the house that morning to look the situation over?

A. No.

Q. When did you pass?

Q. A. I don't remember.

Q. Where did you go after you borrowed the gun?

A. Over the Bus Fleaks' house.

Q. Did you leave the gun there?

A. Yes.

Q. What time did you go back and get it?

A. About 3:30 o'clock in the afternoon.

Q. Where did you carry it to?

A. Went over to the cafe and then back in the edge of the woods.

Q. Did you meet this other boy like you agreed to meet him?

A. Yes, sir.

Q. Was he there?

A. I beat him there.

Q. How long did you wait on him?

A. About twenty minutes.

[fol. 201] Q. Did you go right direct from there to this house?

A. Yes, sir.

Q. You both walked up there?

A. Yes, sir.

Q. Where did you go when you got there?

A. To the east window.

Q. Was there a light in the house?

A. Yes, sir.

Q. Did you look in at the window?

A. Yes, sir.

Q. You and this other boy, Vanzell, together?

A. Yes, sir.

Q. Who did you see in there?

A. His wife. When we first looked in there we didn't see him but we saw his wife and little baby.

Q. How long did you stand at the window?

A. About twenty minutes, I guess.

Q. Did you ever peck on the window to draw attention or anything?

A. No, sir.

Q. How long did she stay so you could see her?

A. She was sitting on the floor by the heater on the other side of him.

Q. Where was he?

A. He was sitting beside the wall on the floor and we couldn't see him.

Q. Did you see the boy?

A. Yes, sir.

Q. Did you see her take the baby and put it to bed?

A. No, sir, I didn't see her put it in the bed.

Q. Where did you go to?

[fol. 202] A. No place.

Q. Where did she go to with the baby?

A. She gave the little baby to him and made up the bed.

Q. Then what happened?

A. Then he got up to go to bed.

Q. Did you see her put the little baby in the bed?

A. I didn't see her put him in bed.

Q. Did you see her take the little baby out of his arms?

A. Yes, sir.

Q. And he got up and pulled off his clothes?

A. Yes, sir.

Q. Did you see him then?

A. Yes, sir.

Q. What did you do?

A. I shot him then as he pulled his clothes off. When he got up from the side of the wall to pull his clothes off, I shot him.

Q. Was the bed close to the window?

A. No, sir.

Q. Had the lights been blown out?

A. No, sir.

Q. Did he get his pants off?

A. Yes, sir.

Q. Then you shot him?

A. Yes, sir.

Q. Where was this other negro, Vanzell?

A. He was standing in front.

Q. What kind of a gun did you have?

A. 12 gauge shot gun.

Q. What kind of shells?

A. No. 4.

[fol. 203] Q. He was over close to the bed when you shot him?

A. He was over close to the window.

Q. How far was he from the window when you fired the shot?

A. He was about three feet from the window.

Q. How close did you have the barrel of the gun to the window when you fired?

A. About two feet from the window.

Q. You were standing on the outside on the ground?

A. Yes, sir.

Q. How was he standing?

A. Standing sideways to me.

Q. Do you remember what side you shot him in?

A. In the left side.

Q. How high up did you shoot him?

A. About in the side.

Q. You aimed to shoot him in the heart?

A. No.

Q. You just shot him in the left side?

A. Yes, sir.

Q. Did he fall?

A. Yes, he fell.

Q. Into the floor?

A. Yes, sir.

Q. Then what did you and this other negro, Vanzell, do?

Q. Waited until the woman came out.

A. Yes, waited until the woman came out.

Q. Did you stand right there?

A. Yes.

Q. Did you hear the woman hollering in the house?

A. She didn't holler.

Q. She came running out hollering for help?

[fol. 204] A. The little boy and baby hollered.

Q. What did she say?

A. She didn't holler.

Q. When she came out, did you see her as she came out the door?

A. Yes, as she came out the door.

Q. Then what?

A. She came out of the house and came around the house to the back.

Q. Did you go, both of you go, to meet her?

A. Yes sir.

Q. Were you facing her when you shot her?

A. Yes, sir.

Q. Did she see you before you shot when she came out?

A. Yes, sir.

Q. What did she do?

A. She started to run.

Q. Was she running when she came around the house?

A. Yes.

Q. Was you running around?

A. I walked around—I didn't have far to go.

Q. Were you at the corner of the house?

A. Yes, sir.

Q. She didn't have a chance to see you?

A. Yes, she was by the house, there.

Q. Did she turn around?

A. No, she stood there.

Q. Where did you shoot her?

A. In the stomach.

Q. Her facing you?

A. Yes, sir.

[fol. 205] Q. How far was she from you?

A. About twelve feet.

Q. She fell?

A. Yes, sir.

Q. Did you have any more shells?

A. Yes, sir.

Q. How many?

A. Five shells.

Q. Did you re-load your gun again?

A. Yes, I did.

Q. Was it a pump or automatic?

A. A single barrel.

Q. You stopped there and loaded your gun again?

A. Yes, sir.

Q. She fell?

A. Yes, sir.

Q. What did she say when she fell?

A. She hollered and fell.

Q. What was she saying when you got the axe?

A. She was sniffing and crying.

Q. Did you or the other boy, Vanzell, hit her with the axe?

A. He, Vanzell, hit her.

Q. Where did you get it?

A. Ont at the wood pile.

Q. Where did you get that axe?

A. He (Vanzell) had it before she came back around there.

Q. Where was the wood pile?

A. It was north east of the house.

Q. Are you right sure that he used the axe?

A. Yes, sir.

Q. How many times did he hit her?

[fol. 206] A. Three times.

Q. Did you see it?

A. Yes, sir.

Q. You were standing right there?

A. Yes, sir.

Q. Did one or both of you put her on the porch?

A. We both dragged her up—one on each side of her—ahold of her arms and sides.

Q. You got one arm and he the other?

A. Yes, sir.

Q. How close to the porch did you put her?

A. About middle way on the porch—close like to the house.

Q. Was she dead then?

A. Yes, sir.

Q. What did you then do?

A. Went in the house.

Q. From the front or back?

A. Front.

Q. What did you then do?

A. Searched his clothes.

Q. Where was he?

A. Laying on the floor.

Q. Did you see anyone else in the house?

A. No, I didn't.

Q. How long were you in the house searching?

A. About five minutes.

Q. How much money was he supposed to have?

A. The other fellow told me about One Hundred Dollars.

Q. Did he tell you where he got this money?

A. Been gambling out there somewhere.

[fol. 207] Q. Then after you searched his clothes, where else did you search?

A. In the dresser.

Q. Where else?

A. That's all.

Q. Then what happened?

A. We set the house on fire, then.

Q. How did you set it on fire?

A. Put coal oil on it.

Q. Which one picked up the lamp?

A. He picked it up and blowed the light out.

Q. You still had the gun in your hand?

A. Yes, sir.

Q. You still had your gun when he picked the axe up?

A. Yes.

Q. You re-loaded the gun so that if anyone else should come out you would have killed them too?

A. Yes, sir.

Q. After you poured the coal oil on the floor, what happened?

A. Poured it on the paper on the side of the wall.

Q. How many matches did you strike?

A. One match.

Q. How many did he strike?

A. He struck three or four.

Q. How many matches did you strike?

A. I struck three or four but only one match set it.

Q. How many places did you set the house on fire?

A. I set it on the kitchen with those other matches.

Q. How many matches did you strike to set the house on fire?

A. I just struck some searching it.

Q. He poured the coal oil on and you set it on fire?

[fol. 208] A. Yes, sir.

Q. Where did you go then?

A. Home.

Q. What did you do with the gun?

A. Took it home with me.

Q. What time did you get home?

A. About 8:30, I guess.

Q. Did you go to bed?

A. Yes, sir.

Q. Did you sleep?

A. Yes.

Q. What did you do the next morning?

A. Went to town and came back and went hunting.

Q. With the same gun?

A. Yes.

Q. What did you do with the gun?

A. He came and got it.

Q. Where did you buy the shells?

A. W. A. Hall store.

Q. How much did you give for them?

A. A quarter.

Q. Where did you go after he came and got the gun?

A. I come on back home to Hugo.

Q. When were you arrested?

A. It was over a week after that.

Q. Did you ever see this other negro, Vanzell, any more?

A. I saw him in jail.

Q. Did you talk about this case?

A. Yes, in Fort Towson.

Q. You both agreed not to tell it?

A. Yes, sir.

{fol. 209] Q. Is this statement you have made true?

A. Yes, sir.

Q. This was made of your own free will and accord?

A. Yes, sir.

Q. Any threats been made on you?

A. No, sir.

Q. Any promises of reward or leniency been made?

A. No, sir.

Q. This statement and confession has been made by you voluntarily?

A. Yes, sir.

Q. You have absolutely told me the truth?

A. Yes, sir, I have.

Q. That's all.

(Signed) W. D. Lyons.

Witnesses: (Signed) Van Raulston, R. H. Marshall, J. F. Dunn.

STATE OF OKLAHOMA,

Pittsburg County, ss.

Before me, a Notary Public, in and for the County and State aforesaid, personally appeared before me W. D. Lyons, and acknowledged to me that he made, published, declared, signed and fingerprinted the within and foregoing statement and confession consisting of eleven (11) pages, and that said statement and confession was made

by him of his own free will and accord, freely and voluntarily, without threat of promise, reward, leniency or remuneration, on this the 23rd day of January, 1940, in the [fol. 210] office of the Warden of the Oklahoma State Penitentiary at McAlester, Oklahoma.

(Signed) John D. Seal, Notary Public. (Seal.) My com. exp. Feb. 3rd, 1943."

By Mr. Belden: Comes now the defendant and renews his objection to the purported confession, and asks that it be stricken from the consideration of this jury as being in violation of the Constitutional rights of this defendant, and in violation of the Fourteenth Amendment to the Constitution of the United States.

By the Court: Overruled and exception is allowed.

Cross-examination.

By Mr. Marshall:

Q. Mr. Duin, how long have you been warden of the penitentiary?

A. About four and one-half years. I have been at the penitentiary about ten years.

Q. Are the prison camps in the county under your jurisdiction?

A. Yes.

Q. Do you know of a prison camp in this vicinity near Fort Towson?

A. There was.

Q. At the time immediately prior to your talk to Lyons, were you making an investigation down there?

A. I came to Fort Towson and to Hugo, and made an investigation of the camp.

Q. Prior to the time you talked to W. D. Lyons, is it not [fol. 211] true that some members of that camp, some inmates, had been under investigation concerning this same murder?

A. There was.

By Mr. Lattimore: We object to that.

By Mr. Marshall: If your Honor please, I think I can show the interest of the warden in this case.

By the Court: I will permit him to answer on cross-examination.

Q. Mr. Dunn, you say this is verbatim of what Lyons said as the result of your questions?

A. Absolutely.

Q. You didn't mean this preliminary part: I, W. D. Lyons, a negro, at 8:15 o'clock P. M., on this the 23rd day of January, 1940. That wasn't said by him, was it?

A. That was read to him.

Q. This preliminary part, starting: "I W. D. Lyons" and ending: "I swear to be the whole truth, without reservation."

A. That isn't his language and that part of the statement was prepared and read to him, and those questions are his own language of his own answers.

Q. Going back to the last page where it speaks of making this of his own free will and accord, freely and voluntarily, without threat or promise, reward, leniency or remuneration, that is not his language is it?

A. I asked him those questions myself.

Q. He didn't volunteer the words like "remuneration"?

A. I asked him those words and he answered.

Q. Did you ask him if he knew what remuneration meant?

A. I didn't ask him. I never let any prisoner make a statement in my office until I tell him his rights, when there is anything involved in the nature of any crime, that might [foi. 212] be where there is a penitentiary offense involved.

Q. If your Honor, please, I move that the whole thing be stricken from the record. It is not in response to the question of mine at all, but is a voluntary statement from the witness.

By the Court: Read the question asked by counsel.

By the Reporter: "Did you ask him if he knew what remuneration meant?"

By the Court: The answer of the warden would not be in response to the question. The answer to the question would be.

A. I answered about like that, that I didn't ask him that.

Q. You did not ask him if he knew that the word remuneration meant?

A. No, I didn't.

Q. Did you have in your possession any purported statement made by Lyons prior to this time?

A. I did not.

Q. Did you have in your possession any reports of investigations of this case concerning Lyons?

A. Not concerning Lyons.

Q. Did you know of the facts in the case?

A. I didn't know anything about the facts in the case of Lyons at all.

Q. Did you know anything about the facts of the murder, the burning, and so forth?

A. I had been here and had been to the place, but I didn't know any facts in the case.

Q. As a matter of fact, how many former inmates of the prison farm there had been arrested concerning this case?

A. I would not be able to answer your question. Something like four or five or six possibly. May be more, I don't know.

Q. That had been arrested?

[fol. 213] A. They had some of them in jail when I was down here.

Q. You knew nothing of the arrest of this man until you saw him, is that right?

A. I had heard that they had him arrested but that was all.

Q. You hadn't heard that he had made a statement?

A. I had not.

By Mr. Horton: We object to the hearsay.

By the Court: Overruled.

Q. When he came into your office approximately at 9:30 why did you ask him if he wanted to make a statement?

A. Because I had known the boy. He had done time there before.

Q. You asked him whether he wanted to make a statement?

A. I asked him had he told the truth about what happened down there.

Q. In what interest were you asking him that question?

A. Because the interest I wanted to find out if he had anything to do with the case.

Q. A personal interest of yours as a citizen, as warden, as a State officer?

A. I will say as a State official.

Q. Is that a common practice in the penitentiary?

A. Yes.

Q. To ask men brought there is they want to make statements?

A. I think our citizens should be interested in a case like that.

Q. The question I am trying to get you to answer is whether you usually do that.

Q. When they are brought to the penitentiary in a case like that I generally help with the case all I can.

Q. You mean a case like that?

A. Yes.

[fol. 214] Q. Can you explain what you mean by case like that?

A. I mean a case that was as brutal and as notorious, and a case where there had been three people murdered and burned. That was my idea as a citizen, to do what I could, not as an official, but as a citizen.

Q. You had not discussed this with anyone prior to this?

A. Only when the boys came in they told me they had Lyons arrested for it.

Q. Did you discuss the question of taking a statement from him with any other officer?

A. No sir.

Q. Had you talked to Mr. Cheatwood prior to this time about this case?

A. Not about this boy. I had talked to him several times about the case, but not about Lyons.

Q. You hadn't talked to anyone in State official capacity, and I include the county officials concerning a statement?

A. Not about Lyons, but I had talked several times about the case. I had been here two or three different times on this case, but at that time Lyons was not in the picture.

Q. You didn't know anything about what happened to Lyons prior to the time you saw him?

A. I do not.

Q. Can you say now, or could you say then, that he hadn't been subjected to any threats, or violence, prior to that time?

A. I couldn't answer that. I know he wasn't up there.

Q. You don't know what happened before he got there?

A. I do not.

Q. In your office I ask you are there bars there?

A. There is.

Q. Do you have handcuffs hanging up on the walls?

[fol. 215] A. No.

Q. You did not have handcuffs in sight while Lyons was there?

A. There are no handcuffs in my office, or even in any office.

Q. You are positive that Mr. Van Raulston did not strike him in your presence?

A. Absolutely not. I don't permit or allow anyone to strike a prisoner in my office.

Q. In your presence, Mr. Van Raulston did not make any threats of any kind?

A. Mr. Van Raulston, I don't think, ever spoke a word. I don't think either of the other gentlemen ever said a word when they came into the office when the boy was making his statement.

Q. All these questions are from you without suggestion from anyone?

A. Absolutely.

Q. The statement was not typed or signed right then, was it?

A. It was taken in shorthand.

Q. And typed out?

A. Yes.

Q. Where was Lyons during the time it was being typed out?

A. He was sitting in my office.

Q. The entire time?

A. He might have got up and went out of the office. I don't remember. Of course, there are two offices, three offices.

Q. He wasn't taken to a cell?

A. He wasn't taken to the cell until the statement was signed.

Q. He was not taken to the kitchen to eat?

A. I believe he might have gone down there to eat while they were typing. I won't be positive. I think I sent him to get something to eat during the time the statement was [fol. 216] being typed, but I won't be positive.

Q. The next question, if you don't mind my going through the question a little better.

A. That is all right.

Q. Did you know whether Lyons had an attorney at the time you talked to him? Did you ask him?

A. He didn't have any attorney at that time.

Q. I notice on page eight, this by you: "What was she saying when you got the axe?" What prompted you to ask that question? Where did you learn about an axe?

A. I had been down here, as I told you, on three or four different occasions. I had been out to the scene. I knew that I had talked with the boy before the statement was made, as I said before. I talked to him a few minutes and went into the case, and asked him after I had talked to him, did he still want to make a statement, and if so, I would call my secretary. He promptly answered he wanted to tell the truth about it and make it short.

Q. But I mean whether he told you voluntarily anything about the axe. Who raised that question?

A. I had talked to him. He had told me about the axe before the statement was made.

Q. He had told you about the axe before that?

A. Yes.

Q. These questions here where you, if you know what I mean by leading questions?

A. Yes.

Q. They were not out of your own mind, but would come up from your talk prior to that time?

A. He had outlined the case to me before I called my secretary in to take the statement down. When I got through with him then I told him: "W. D., if you want to make a [fol. 217] statement I'll call my secretary in and have him take it down if you want to sign the statement, and if you want to tell the truth about the case."

Q. Did he say he wanted to sign his statement?

A. He said he wanted to tell the truth and would sign the statement.

Q. Was there a suggestion that the fingerprints here be put on it?

A. I always put a finger print on when I put the name of every prisoner of every case that comes.

Q. As a matter of fact, who suggested the fingerprint be put on it?

A. That is a matter carried on in the penitentiary. There is no prisoner that ever signs a document of that kind unless he fingerprints it.

Q. What I am trying to get in this particular case, who suggested to Lyons that he put his finger prints on it?

A. I did when he signed his name. And he has been printed before.

By Mr. Marshall: Now, if your Honor, please, I did not object the other time but the witness constantly refers to what has been excluded by the Court.

By the Court: That will be stricken. That voluntary statement will be stricken.

“ Lyons had given you a coherent story before this was taken down, was that right?

A. Yes.

Q. Why didn't you let him dictate it that way instead of questions and answers? Was there a reason?

A. They didn't have any reason.

Q. But you preferred the question and answer method?

A. I asked him the questions and he answered. I also [fol. 218] asked him did he want me to ask the questions or did he want to make the statement himself, and he said go ahead.

Q. That does not appear here.

A. That was before the statement was made.

Q. That was about nine thirty when the officer brought him in?

A. I wouldn't be positive, between eight and ten, something like that. May be nine thirty. I am not positive when the time was. I had been home and came back to the penitentiary.

Q. About how long was this preliminary discussion with him?

A. About ten or fifteen minutes.

Q. And the stenographer was brought in promptly then?

A. Yes.

Q. And when was the chaplain brought in?

A. He was brought in after the statement was made. Then the statement, the chaplain read the statement to Lyons, and asked Lyons was that statement true and his own words, and he said it was. He asked Lyons if he wanted to sign it and he told him he did. I handed him a pen and he signed the statement.

Q. About what time was this?

A. I guess around nine, or nine thirty. I don't know the exact time it was.

Q. You say it was somewhere between eight or nine thirty when he was brought in.

A. He was there an hour, or an hour and twenty minutes, I wouldn't say.

Q. For the entire transaction, signing and finger printing, is what I want to know. I don't care about the times between.

A. I would say it was after nine o'clock when they got through.

Q. He was brought in before nine then?

[fol. 219] A. Yes.

Q. If I understood that he was brought in about nine thirty, then you are not positive?

A. I am not positive just what time he was brought in the office. But it was around between eight and nine or nine thirty.

Q. And it was approximately how long, an hour, hour and a half, or how long was it that the whole transaction took place?

A. It took possibly an hour and twenty minutes.

Q. Was Mr. Van Raulston there the whole time?

A. He was.

Q. And Mr. Marshall?

A. He was.

Q. Then what happened after the statement was taken?

A. The statement was typewritten.

Q. After it was signed, then what?

A. He was sent to the cell.

Q. Where was the cell?

A. We have a cell on the fourth floor of the cell house where we keep safe-keeping of prisoners; which the counties built. It does not belong to the penitentiary, and we have cells that we put them in.

Q. And he wasn't by any chance taken to the basement?

A. He was not.

Q. Is that where the death row is, in the basement?

A. The death row is on the first floor.

Q. He was not put in the death row in any of those cells?

A. No, not in there.

Q. And was not taken to a cell where he could see the electric chair?

A. No.

Q. You are positive?

A. I am.

[fol. 220] Q. Did you take him to the fourth floor or send him?

A. I sent him by the sergeant.

Q. How many electrocutions have you supervised at this time?

By Mr. Horton: We object as incompetent, irrelevant and immaterial at this time.

By Mr. Marshall: We are laying a foundation for the possible impeachment of the witness at a later time. I think we are privileged to go into it during the whole transaction, and are entitled to go into it and to question him on this point.

By Mr. Horton: You can't lay a foundation to impeach him on an immaterial matter.

By Mr. Marshall: You are familiar with the testimony yesterday, and the jury is not. We are laying the foundation at this time.

By the Court: I remember that there was a reference made, the question was asked in the testimony yesterday.

By Mr. Horton: But there were other references made about the defendant that were not submitted, and the Court ruled that they should not be, and they should not try to impeach the witness on an immaterial matter.

By Mr. Belden: We have a right to show the interest of this witness in order that the jury might know what weight to give, and the condition is—

By Mr. Horton: We withdraw that objection.

By the Court: All right.

Q. Speaking of the time- you talked to W. D. Lyons?

A. I think about fourteen.

Q. About fourteen prior to that time? Did you hold any position before you were warden?

A. I was assistant warden.

Q. Did you handle that as assistant warden?

A. The warden always supervised electrocutions.

[fol. 221] Q. And you have had fourteen up to that time?

A. Of mine.

Q. Did you talk about that fact with Lyons?

A. No.

Q. Concerning how many men you had electrocuted?

A. Absolutely not.

Q. You did not?

A. I did not.

Q. Did you at any time threaten Lyons in any manner?

A. As I stated before, I don't threaten any prisoner in making a statement in a matter like this. I did not.

Q. You answer that you did not?

A. Absolutely.

Q. Did you say anything to him of the possibility of a life sentence?

A. There was not a mention about what he might get, or would get, or otherwise.

Q. No mention was made of that?

A. No.

Q. I want to come back to the time you were here investigating. As I understand, you were investigating—just what?

A. The prisoners were under my supervision. They had a camp down here seven or eight miles. I don't know how far it was to where the camp was, but only a short distance, and they had some of the boys in jail. I came to look into the matter and see what accusations they had them for, and see if they were mixed up in the deal.

Q. Subsequent to that time was there not a change in the administration of the camp, the officials in charge of the camp?

Q. Do you mean before this happened?

Q. Around during that time?

A. There was not at that time.

[fol. 222] Q. Was there shortly thereafter:

A. I made one shortly thereafter.

Q. Was there, or was there not, wide newspaper publicity to the effect that inmates of the camp were charged with this murder?

A. There was newspaper publicity. There had been some arrests for it.

Q. Wasn't the newspaper publicity condemning the management, the arrangement whereby the men got out from the camp?

A. There was.

Q. That was during the time that Lyons was brought to you?

A. That is right.

Redirect examination.

By Mr. Horton:

Q. Do you ever have prisoners in the camps or in the walls to violate the law?

A. Yes.

Q. What do you do when they violate the law?

A. They are prosecuted like any other citizens of the United States. I go into the case, or help with the officials, and the county attorney, or whoever it might be.

Q. Do you ever try to conceal violations of law in your institution by inmates?

A. I do not. I have taken a good many cases to the county attorney and helped him.

Recross-examination.

By Mr. Belden:

Q. Do you know Vernon Cheatwood, special investigator for the Governor?

A. Yes.

Q. Do you remember him coming to the penitentiary after W. D. Lyons was incarcerated?

[fol. 223] A. I don't remember whether I was there or not when he came.

Q. You know he was there a time or two?

A. He has been to the penitentiary a lot of times.

Q. But after W. D. Lyons was taken there?

A. Yes.

Q. Do you know of him going and talking to W. D. Lyons while he was there?

A. I couldn't say whether he talked to W. D. Lyons or not.

Q. You don't know whether he talked, nor what took place when Cheatwood talked to him, do you?

A. I don't know whether he talked to Lyons or not.

Q. Nor what might have taken place if he did?

A. I have said that I didn't know whether he talked to Lyons or not.

Q. And are therefore not in a position to know what took place if he did? Is that right?

A. That is right.

Witness Excused.

VAN RAULSTON, in behalf of the State of Oklahoma in chief, having been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. State your name.

A. Van Raulston.

Q. What position did you hold in 1940?

A. Deputy sheriff.

Q. Do you know W. D. Lyons?

A. Yes.

Q. Do you remember the occasion when he was taken to the McAlester Penitentiary?

[fol. 224] A. Yes.

Q. Did you go with him?

A. Yes.

Q. Where did you take him when you got there?

A. Into the warden's office.

Q. I hand you a State's exhibit which has been identified as a statement by the defendant. Were you present when that was made?

A. Yes.

Q. Where was it made?

A. In the warden's office.

Q. Was force, duress, promise of remuneration, or violence used at that time toward this defendant?

A. There was not.

Q. Did anybody beat him?

A. No sir.

Q. Did you threaten him?

A. No sir.

Q. Threaten him with the electric chair?

A. No sir.

Cross-examination.

By Mr. Belden:

Q. Mr. Raulston, you were a deputy sheriff at that time, were you not?

A. Yes.

Q. And you were present in the county attorney's office when the first confession was obtained, were you not?

A. I was not.

Q. Weren't you up there that night?

A. A part of the time.

Q. You were there before this was obtained?

A. The early part of the night I was.

[fol. 225] Q. What time was that that you were there?

A. It was around nine or ten o'clock.

Q. What was going on at that time?

A. They were questioning him.

Q. Who was questioning him?

A. I don't remember but one or two that were in there.

I think Vernon Cheatwood was in there.

Q. Who else?

A. I couldn't tell you.

Q. Was he the only one you remember?

A. There was more there but I don't remember who they were.

Q. How many more were there?

A. I think two or three more were in there.

Q. Wasn't there five or six?

A. Not at the time I was in there.

Q. How long were you in there?

A. Just a few minutes.

Q. Cheatwood was asking him questions at that time?

By Mr. Horton: We object as improper cross-examination.

By the Court: Sustained. You may cross-examine him with reference to what he testified about this confession, but not as to that.

By Mr. Belden: Court please, I think we have a right to show that this defendant, at the time of the first confession—

By Mr. Horton: The first confession is not in evidence, your Honor.

By Mr. Belden: Let me—

By Mr. Lattimore: If he desires to state that, let him state it to the Court out of the presence of the jury.

Thereupon: Counsel confer with the Court, whereupon the following proceedings were had out of the hearing of the jury:

[fol. 226] By Mr. Belden: The defendant desires to show that this witness, Van Raulston, was present at the time

of the first confession wherein violence and force were used, and that he took the defendant from Antlers, Oklahoma, to the penitentiary, and since he was present at the time when force and violence were used, that the defendant stood in fear that punishment might be repeated while he was in custody and in the presence of this witness, Van Raulston, who was a deputy sheriff.

By Mr. Lattimore: We object to that as improper cross-examination, and at this time is incompetent, irrelevant and immaterial.

By the Court: Sustained, and exception allowed.

By Mr. Belden: All right. And further, the defendant desires to show that if the witnesses were permitted to answer he would state that he was present in the county attorney's office on the night during the questioning when the first confession was obtained.

By the Court: Overruled, exception allowed.

By Mr. Belden: Give us our exception.

By Mr. Belden: (Continuing cross-examination in the hearing of the jury).

Q. Mr. Raulston, what was the first-connection that you had with this case?

A. The night that it happened.

Q. The night that it happened, what did you do?

A. I went to the scene of the crime.

Q. Did you make an investigation?

A. Not much.

Q. Not much? Do you know whether or not there were others arrested, charged with this crime?

[fol. 227] By Mr. Lattimore: We object as not proper cross-examination.

By the Court? Overruled. You may answer.

A. There were.

Q. Will you state who they were?

By Mr. Lattimore: Objected to as not proper cross-examination, and incompetent, irrelevant and immaterial.

By Mr. Belden: (After-conference) strike that question.

(Q.) Now, you took part in the investigation of this case from the time it occurred up until the time of the first confession?

A. A part of the time.

Q. From the time the first confession was obtained, how long was it before he was taken to the penitentiary and the second confession obtained?

A. It was the next evening after the first confession that I carried him to McAlester.

Q. The next evening after the first confession? Do you know what time the confession was obtained?

A. At McAlester?

Q. No, here in the county attorney's office.

A. No, I don't.

Q. If it was obtained somewhere between two and four o'clock in the morning—

A. I would not know.

Q. If it was, then you took him to McAlester that same day, did you not?

A. I did.

Q. And this confession, purported confession, obtained at the penitentiary, in the warden's office, was obtained on the same day that this one was obtained here in the county attorney's office?

A. If it was obtained that morning, it was. But I don't know.

[fol. 228] Q. If it was obtained that morning, then the two confessions were obtained the same day?

A. That is right.

Redirect examination.

By Mr. Horton:

Q. Where did you take him from when you went to McAlester?

A. Antlers.

Q. How long did he stay at Antlers?

A. I don't remember.

Q. You don't know whether he had been at Antlers one day or two days when you took him from Antlers?

By Mr. Marshall: I wonder if the County Attorney is impeaching his own witness. He has testified positively, and now—

By the Court: Possibly to refresh his memory. You may answer.

A. I don't know.

Q. You did take him from the Antlers jail to McAlester, and not from the Hugo jail?

A. That is right.

Recross-examination.

By Mr. Belden:

Q. And you did take him from Antlers on the day of the morning of the confession in the county attorney's office, is that right?

By Mr. Lattimore: That is objected to. He has already answered that he did not know when the first confession was made.

By the Court: He was not certain about that.

Q. All right. If the confession was obtained in the county attorney's office after midnight, some time during the early morning, then you took him from Antlers to the penitentiary that same day, did you?

[fol. 229] Q. You are mixed up on your time? A while ago you did state—

A. That is right.

Q.—that you took him the next day after the confession, or the same day of the confession, if it was obtained in the early morning of that day?

A. I still wouldn't be positive about that.

Q. You are not positive now?

A. No.

Q. Do you know the day you took him to the penitentiary?

A. No, I don't.

Q. Can you get the records to show what day you took him to the penitentiary?

A. Well, I think I could.

Q. Do you know what day of the week it was?

A. No, I don't.

Q. So now your former statement as to when you took him, you don't know now how near that was to the time you heard the questions asked him by Mr. Cheatwood in the county attorney's office?

A. No, I don't.

Q. You don't know about that?

A. No, sir.

Redirect examination.

By Mr. Horton:

Q. Tell the jury why you were not in the investigation at all times.

A. Well I was in a car wreck and I wasn't able.

Q. When were you in the car wreck?

A. The night of the murder.

Q. On the night that the house burned?

A. Yes.

Q. Were you hurt?

[fol. 230] A. I was.

By Mr. Marshall: If the Court please, I understand the ruling was that of all matters prior to this time, we were not permitted to ask. Now we have the court attorney going over the same field that we wanted to go into, and we object to the whole line, and ask that questions so answered on this line be stricken.

By Mr. Lattimore: They were brought out by the defendant. That he was in the investigation a part of the time.

By the Court: He may state why he was not in the investigation the full time.

By Mr. Marshall: Exception.

By the Court: Exception allowed.

Witness excused.

ROY MARSHALL, in behalf of the State of Oklahoma in chief, after being duly sworn, testified as follows: to-wit:

Direct examination.

By Mr. Horton:

Q. What is your name?

A. Roy Marshall.

Q. Where do you live?

A. Hugo.

Q. What is your business?

A. Barber.

Q. What was your occupation last January, 1940?

A. Barber.

Q. Have you been an officer at any time?

A. No.

Q. Do you know W. D. Lyons, the defendant in this case?

A. Yes.

[fol. 231] Q. Do you remember when the Rogers family was murdered at Fort Towson?

A. Yes.

Q. Did you participate in the investigation of that case?

A. No.

Q. Do you remember the occasion when the defendant was taken to McAlester?

A. Yes.

Q. Do you know who went with him?

A. Van Raulston and myself.

Q. Why did you go?

A. I went to drive the car.

Q. And why?

A. Van was hurt in a wreck, hurt in the chest and shoulder.

Q. Where did you go when you got to the penitentiary?

A. To the warden's office.

Q. Was this defendant present?

A. Yes.

Q. Who else was present?

A. In the office?

Q. Yes.

A. Jess Dunn and Van, and Lyons, and that was all until he called the reporter.

Q. Were you present at times when Mr. Dunn interrogated this defendant?

A. Yes.

Q. I hand you State's Exhibit Nine, which has been identified as a statement and confession made by the defendant at McAlester in Mr. Dunn's office. Were you present when the statement was made?

A. Yes.

Q. Were you present when it was signed?

[fol. 232] A. Yes.

Q. Were you present when the thumbprints were put on it?

A. Yes.

Q. Did the defendant sign it on each page?

A. Yes.

Q. Is that his own signature?

A. Yes, looks like his.

Q. Did he sign it of his own free will and volition?

A. It was.

Q. Was any force, duress, threats or promise used at that time?

A. No sir.

Cross-examination.

By Mr. Beldon:

Q. At the time he signed up, there was not any threats at that time particularly in the presence of the stenographer and the chaplain and so forth, that is what the county attorney asked you. At that time, of course, in the presence of the chaplain, or anything like that?

A. No.

Q. How long have you known Mr. Van Raulston?

A. I don't know.

Q. How come you to go that day? Who suggested it?

A. He asked me to go with him.

Q. You know it is customary for two officers to attend to taking a man charged with crime, especially murder, don't you?

A. No, I didn't know it.

Q. Did Mr. Raulston talk to the defendant on the way from Antlers to the penitentiary?

A. Talk to him?

Q. Yes.

A. We both talked to him going up there.

Q. About what?

[fol. 233] A. Just first one thing then another.

Q. And what were his answers to first one thing and another?

A. There wasn't much said going up there at any time. The negro was riding in the back of the car and I think he went to sleep a part of the time.

Q. When you did talk what did you talk about?

A. I don't remember anything.

Q. You didn't by chance talk to him about this alleged crime, did you?

A. I don't know whether it was mentioned or not.

Q. Now, after that was prepared, he was told to sign it, wasn't he?

A. He was asked if he wanted to sign it.

Q. And was told to put the thumbmarks on it?

A. Yes.

Re-direct examination.

By Mr. Horton:

Q. Were you present at all times that this statement was being prepared in Jess Dunn's office?

A. Yes.

Q. Was any threat, or promise, or force, or violence, used at any time during your presence?

A. No sir.

Re-cross-examination.

By Mr. Horton:

Q. What time was it when you went to the warden's office?

A. I couldn't tell you. It was dark when we left Antlers, about dark. I guess it took two hours and a half to drive it. Must have been ten o'clock or after when we got there. Around ten.

Q. What time was it that you left the warden's office?

[fol. 234] A. I don't remember. I guess we were there two hours and a half or more.

Q. You left immediately after the confession?

A. We ate supper up there, had a meal and ate something.

Q. When you obtained this confession there you did not get supper until somewhere around twelve o'clock that night?

A. We had eaten before we went up there.

Q. Where did you eat before you went up there?

A. I ate at home.

Q. What time did you leave?

A. It was around, when we left here, just before six o'clock.

Q. And you stayed there with him until about twelve o'clock that night?

A. Something—I couldn't tell what time it was when we ate.

Q. Do you mean six o'clock in the morning or afternoon?

A. Six o'clock in the afternoon.

Q. The day that you took him to the penitentiary?

A. Yes.

Q. Why did you stay all that time at the penitentiary? What was the purpose of that?

A. It takes quite a bit of time for the stenographer to get that thing fixed for him to sign it.

Q. Why did you stay to get the confession? How come you to stay?

A. When Mr. Dunn asked him if he wanted to make a confession he said he did.

Q. How soon was it after you got there that he said he wanted to make a confession.

A. It wasn't very long.

Q. About how long was that?

A. Something around 30 minutes probably.

Q. About 30 minutes before he said he would make it? [fol. 235] A. Yes.

Q. Now, from the time you first got there and that thirty minutes, what took place?

A. There wasn't anything. We sat around in the office, talked to Mr. Dunn awhile, and he just—the regular procedure in getting in and out. I knew several boys.

Q. How long did Mr. Dunn talk to him before you say he said he would sign a confession?

A. He didn't talk to him but a few minutes. When we went back to the main office he asked him if he wanted to make a statement and tell the truth about it.

Q. Where had you been before you went to the main office?

A. At the front where you go in there.

Q. Do you remember the first thing Mr. Dunn asked him?

A. No, I don't remember the exact words.

Q. You don't remember?

A. No.

Q. Do you remember any questions he asked him?

A. Nothing, he asked him if he wanted to make a statement and Lyons told him he did.

Q. How long were you in there during that conversation?

A. When we went in, I was in the front office all the time until he made the statement.

Q. During the time of questioning and answering, was how long?

A. I couldn't tell.

Q. You were there.

A. Yes.

Q. And the only question you remember at this time is that Mr. Dunn asked the defendant if he wanted to make a confession. Is that the only thing you remember?

[fol. 236] A. That is all I remember. He asked him if he wanted to make a confession and he said he did. He asked him questions all the way through.

Q. But you don't remember them?

A. Yes, I remember all of them, all he asked him and the statements he made.

Re-direct examination.

By Mr. Horton:

Q. You mean, in response to Mr. Belden's question, you don't remember the exact questions he asked in the statement?

A. No, I don't remember all of them. I was a disinterested party. I was just sitting in the office until they got through. I had no personal interest. I just drove the car for Mr. Raulston. That was all the interest I had, and sat in the office until they took the confession.

Re-cross examination.

By Mr. Belden:

Q. What impressed on your mind that one particular question and answer?

A. When we went in?

Q. I don't care what time, when you went in or when.

A. When he asked him if he wanted to make a confession?

Q. Yes, but you swore you don't remember.

A. I can tell some things he asked him.

Q. You said you don't remember?

A. I didn't know that is what you were talking about. I can tell a few questions he asked him.

Q. What did you think I was talking about when I asked if you remembered anything else? What did you think I was talking about?

A. I didn't pay much attention.

[fol. 237] Re-direct examination.

By Mr. Horton:

Q. You mean in a general way you can tell what questions he was asked about this crime?

A. Yes.

Q. Tell it in a general way.

A. I remember he asked him when he done the shooting, where he was standing, and how he shot the man through a window.

Q. Did he answer?

A. He answered, told where the man was standing, that he had been in the corner, when he came out by the window, he showed Mr. Dunn, turned his side to the window and showed Mr. Dunn where he shot the man.

Recross examination.

By Mr. Belden:

Q. Did you ever read this purported confession?

A. I heard it read.

Q. When?

A. In the office.

Q. Any time since then?

A. No sir.

Q. Have you discussed this case recently with anyone?

A. No sir.

Witness excused..

CAP DUNCAN, in behalf of the State of Oklahoma in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. State your name.

A. Cap Duncan.

[fol. 238] Q. What position do you hold in Choctaw County?

A. Sheriff.

Q. What position did you hold last January, 1940?

A. I was sergeant at the Oklahoma State Penitentiary.

Q. Do you remember the occasion when the defendant was brought to the penitentiary?

A. Yes.

Q. Did you talk to him any time after he had been brought up there?

A. I did.

Q. How long had he been there when you talked to this defendant?

A. I wouldn't be positive. I would say two or three or four days.

Q. Where was he when you talked to him?

A. He was "on high," what we call it, about the fourth floor.

Q. Was he in a cell?

A. Yes.

Q. Who was present when you talked to him?

A. Another guard, Bert Crawford.

Q. Was anyone else present?

A. No sir.

Q. When you had this conversation with him did you use any threats toward him?

A. I did not.

Q. Tell the jury how you happened to talk to him?

A. Mr. Crawford had once lived at Fort Towson. He knew W. D. Lyons and the Rogers family. We went to talk to him. Mr. Crawford and I went to talk to Lyons.

Q. Was anyone else in the cell with W. D. Lyons then?

A. No sir.

Q. Did you talk to him about this murder?

[fols. 239-245] A. Yes sir.

Q. What was said?

A. He said he and Van Bizzel killed the Rogers family.

Q. How did he say he killed them?

A. Shot them.

Cross-examination.

By Mr. Belden:

Q. Now, Mr. Duncan, you were a former sheriff in this county?

A. Yes sir.

Q. And have been an officer for a long time?

A. I was an officer twelve years.

Q. And have been living here, and have been a former sheriff, how many terms? Two?

A. Yes sir.

Q. And knew about the situation down there, and was interested in it, you knew that the confession was obtained?

A. Yes, I had heard about it. I had not seen them and didn't hear them made.

Q. And you did go back to talk to him again about it?

A. Yes sir.

Witness Excused.

By Mr. Marshall; If your Honor please; for the sake of the record, may we have the record show that pursuant to his duty, Mr. Duncan has been in the court room the whole time and will be and that the rule does not apply. He has been with Lyons the whole time, but I think the record should show that he has been.

By the Court: I don't know whether he has been.

By Mr. Duncan. Yes, sir, I have been here all the time.

By the Court: Yes, the record may show that Mr. Duncan is the sheriff and has been in the room and was excused from the rule.

[fol. 246] REASOR CAIN, in behalf of the State of Oklahoma in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. State your name?

A. Reasor Cain.

Q. Mr. Cain, what position did you hold in January, 1940?

A. Special officer for the Frisco Railroad.

Q. Do you remember when the defendant, W. D. Lyons occurred?

A. I do.

Q. Do you remember when the Rogers murder case was arrested?

A. I do.

Q. How long was that after the murder?

A. As well as I recall it was about the 11th of January when he was arrested.

Q. Some eleven days after the murder?

A. I believe so. I am not positive.

Q. Did you go down when the arrest was made?

A. Yes sir.

Q. Where was the arrest made?

A. In the Belmont Addition, at his home.

Q. Where is that?

A. In the southwest end of town down here.

Q. In Hugo?

A. Yes.

Q. Who was he living with?

A. He was living with his wife and her mother.

Q. Do you remember what her name was? His wife's mother?

A. I don't recall what her name is.

[fol. 247] Q. Just tell the Court and jury what happened and who went with you.

A. I don't recall who went. There was two or three cars of officers that went down there. I think Howard Rorie was in a car, and Oscar Bearden, and Mr. McKinzie, and I believe Mr. Williams, and possibly Theron Loftin. That is all I recall.

Q. Tell what happened.

A. We went down and walked up to the house. I suppose we were in about fifty yards of the house, someone opened the front door. We went to the house and asked for W. D. He wasn't there. His wife said he run off. The officers made quite a search and couldn't find him. I stayed in the house, and they all left except myself. I stayed for a few minutes. Oscar Bearden came back. We stayed there approximately an hour, I suppose, when he came home.

Q. Do you know why he came home?

A. Yes. His wife called him several times.

By Mr. Marshall: Now, if your Honor please, we want to know, I don't know whether it is hearsay or not. I don't think we want everything in the record that should not be there. I would like to know what he knows, show that Lyons' wife called Lyons, and how he knew it, before he is permitted to answer.

By the Court: State what you heard.

Q. State what you heard.

A. I heard her call him. She went to the door and called him.

By Mr. Marshall: If your Honor please, unless he shows that Lyons was there, that is hearsay, and to hear her call is hearsay unless he can show that Lyons was there.

By the Court: He said Lyons was not there.

By Mr. Horton: We withdraw the question. State what happened then, Mr. Cain?

[fol. 248] A. Well, while we were waiting for him to come back, which we thought he would do because his wife had told us he left without hat or coat——

By Mr. Marshall: Now, if your Honor please——

Q. Don't tell what his wife said.

A. Just what do you want me to tell?

Q. How long was he gone?

A. I would say approximately an hour.

Q. Did he come back?

A. Yes.

Q. What did you do?

A. We placed him under arrest and brought him to jail.

Q. Which way did he come from?

A. He came from the north of the house. I don't know where he came from.

Q. When you got down there did you see him leave?

A. I didn't see him leave.

Q. What did you do?

A. We placed him under arrest and brought him to jail.

Cross-examination.

By Mr. Marshall:

Q. What is your occupation at this time?

A. Clerk for the draft board.

Q. Did you leave the Frisco voluntarily?

By Mr. Horton: Objected to as incompetent, irrelevant and immaterial.

By Mr. Marshall: We would like to find out whether he was released from the Frisco as a result of this case, which would give him a motive for testifying.

By Mr. Horton: I don't think for every witness, we have to establish a motive for his testimony. They are under [fol. 249] oath to tell the truth.

By the Court: I think that is right. Whether he was fired, or his time was out, he told who his employer is now.

By Mr. Marshall: May we have an exception.

By the Court: Yes.

Q. How did it happen that you went to the house to get Lyons?

A. I went with the other officers on information that he was suspected of the murder of the Rogers family.

Q. Were you requested to go?

A. Yes, I had been requested to work in the case several days before that.

Q. By whom?

A. By the sheriff, Roy Harmon.

Q. When you went there and Lyons came in, will you explain how he was placed under arrest?

A. When he came in the house, I told him to put his hands up, and I told him the third time and he would put them up until Mr. Bearden came out from behind the stove where he was hiding. We took his belt, didn't have handcuffs, run it through his arms and brought him to jail.

Q. Did you strap his arms with the belt?

A. What do you mean by strap?

Q. The motion you made does not appear.

A. Drew his arms back and run the belt through his arms and fastened it. And he was brought to jail.

Q. Did you stop on the way?

A. No sir.

Q. Were you with him the whole time between the time he was arrested and the time he was brought to the jail?

A. All the way until he was turned over to the jailor.

Q. Did you stop on the way?

[fol. 250] A. No.

Q. Did you or the officer with you pick up a piece of board?

A. No.

Q. A piece of wood of any kind?

A. No.

Q. Did you strike him with a piece of wood at that time?

A. I did not.

Q. Did you strike him with anything during that time?

A. I did not.

Q. Did the officer with you strike him at any time with anything?

A. No.

Q. Then what happened?

A. I brought him and put him in jail, turned him over to the jailor.

Q. Did you go to the second floor of the jail with him?

A. I did not.

Q. When was the next time you saw him?

A. It was the night they questioned him, as well as I remember, around the night of the 22nd of January.

Q. They questioned him where?

A. In the county attorney's office.

Q. Who else was there?

A. Mr. Horton was there, Cheatwood was there, Mr. Harmon was there, and I am not sure who else, if anyone.

Q. Was the Assistant County Attorney there?

A. It seems to me he was there a part of the time. I don't know whether he was there all the time or not.

Q. Were any of the State highway patrolmen there?

A. There was.

Q. One or two?

A. I believe there was two a part of the time and possibly [fol. 251] all the time. I don't recall.

Q. How many were the maximum number in there at any time that you remember?

A. I would say three or four, may be five.

Q. I mean was there any time there were six or seven?

A. I don't recall there were or not.

Q. Were you there the whole time he was questioned?

A. In and out.

Q. What time did it start, approximately?

A. I don't know what time it started.

Q. What time did it stop, approximately?

A. I don't know, I did not check the time. I would just imagine around two or two thirty o'clock in the morning.

Q. It started the night before, didn't it?

A. Yes.

Q. While you were there did anyone in your presence strike him?

A. No.

Q. Did you see anyone slap him?

A. I did not.

Q. Did anyone have a blackjack in his hand?

A. I did not see anyone with a blackjack in his hand.

Q. Did you see anyone have a whip in his hand?

A. Not that I saw.

Q. Did you at any time see him on the floor?

A. I never.

Q. Where was he?

A. Sitting in a chair.

Q. How close were the officers to him?

A. Mr. Cheatwood was pretty close to him and the other officers were back.

[fol. 252] Q. You mean pretty close, can you estimate it?

A. I would say two feet.

Q. Did you see Mr. Cheatwood's hands?

A. Yes.

Q. Did he have anything in them?

A. Not that I saw.

Q. You saw his hands?

A. Yes.

Q. And if he had anything in them you would have seen it?

A. I didn't see anything in his hands.

Q. Did anybody strike him with a strap?

A. No.

Q. Or anything?

A. No.

Q. Did you see anyone strike him with a small strap?

A. I didn't see anyone strike him with a strap or anything else.

Q. Did you hear anyone curse him?

A. No.

Q. They didn't curse him during that time?

A. I don't recall that they did.

Q. You didn't hear anyone say he had better talk or what might happen to him?

A. No.

Q. Was all the talk just like you and I are talking now?

A. You might term it like you and I are talking.

Q. Nobody yelled at him?

A. I didn't hear anyone yell at him.

Q. Did you see anyone take a pan of bones and put it in his lap?

A. Yes.

Q. What was said when they put the pan of bones in his lap?

[fol. 253] A. I don't recall.

Q. But you saw the pan of bones in his lap?

A. I did.

Q. You are positive no one struck him?

A. I did not see anyone strike him at any time.

Q. You are positive no one cursed him?

A. I did not hear anyone curse him.

Q. You were there how much of the time?

A. I don't know how much of the time. I was in and out like the rest of them. I did not keep a record of how many minutes I was in there and how many minutes I was out of there.

Q. Did he have scars that you could see?

A. No.

Q. When you arrested him did he have on overalls?

A. I don't remember. He had on a belt. We took the belt off. That is the one we used.

Q. You did not strike his head against a tree out near the court house did you?

A. I did not.

Q. You didn't see other officers do it?

A. No.

Q. You did not see anyone strike his head against the wall in the sheriff's office after you brought him there, did you?

A. I did not.

Q. While the questioning was going on, what were the types of questions?

A. Going over the scene of the crime.

Q. Who was asking the questions?

A. Mr. Cheatwood was asking the questions.

Q. Mr. Cheatwood was asking the questions and wasn't he telling him you had better answer them?

[fol. 254] A. No, he didn't tell him he had better answer them, that I heard.

Q. Were you there when he made the confession?

A. I was not in the room when he made the confession.

Q. Were you there after he made the confession?

A. Yes.

Q. Were there any signs of beating on Lyons at all?

A. No.

Q. You know what I mean? Any welts on his forearms?

A. I didn't see any welts on his forehead or anything else.

Q. You didn't see him after that until the preliminary hearing?

A. No.

Q. You did not see him any more after that?

A. No.

Q. You don't know anything about their taking him to McAlester the next day? Were you there then?

A. I believe I was.

Q. When they had the picture taken?

A. I was out there.

Q. About what time was that?

A. I don't remember what time it was.

Q. Morning or afternoon?

A. I don't recall.

Q. Was it the same day as the day he made his confession?

A. I don't remember whether it was or not.

Q. After you think a little while, you cannot remember?

A. I don't know whether they kept him one day or two days. I don't know whether they took the picture the day he made the confession or not.

[fol. 255] Q. Were you there when the county attorney asked someone to stop whipping Lyons?

A. No, I never heard anything like that.

Q. On the first night they arrested him were you present when the sheriff came in and told them to stop whipping him?

A. I told you I took him and put him in jail. I did not see him until the night they questioned him, about eleven days afterwards.

Q. How did it happen that you came to the county attorney's office? Did someone call you?

A. Yes.

Q. Someone requested you to come over?

A. Yes.

Q. For what purpose?

A. To question this W. D. Lyons, trying to clear this murder case.

Q. You were requested to help on it?

A. That is right.

Witness excused.

HOWARD RORIE, in behalf of the State of Oklahoma in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. State your name.

A. Howard Rorie.

Q. Where do you live?

A. 413 North Second, Hugo.

Q. Do you remember when the Rogers family murder case occurred?

A. Yes.

Q. Did you at that time help in the investigation?

[fol. 256] A. Yes.

Q. Do you remember when this defendant was arrested?

A. Yes.

Q. About how long was that after the people had been murdered down there?

A. It was, let me see, not to be exact, but like it happened Sunday night, it was around Tuesday or Wednesday night.

Q. Did you go to the house to make the arrest?

A. Yes.

Q. Can you state his conduct at that time?

A. At the time we went after him he broke and run.

Q. Did you see him break and run?

A. I couldn't be sure I saw him run.

Q. Did you see anyone?

A. Yes, someone run out of the house and run off.

Q. Where did they run?

A. Run to a piece of woods, a patch of woods. Knocked the light out.

Q. Could you tell whether it was a man or woman?

A. You could tell it was a man.

Q. What size man was it?

A. Around 185 or 190 pounds and about six foot.

Q. Did you go in the house?

A. Yes sir.

Q. Was there any man in the house?

A. There was a lady, one woman and about two girls.

Q. Did you see him any other time that night?

A. Yes, that night he came in and Bearden brought him in.

Q. Did you see him after he was brought to jail?

A. Yes, about an hour and a half after we went out there they brought him in.

[fol. 257] Q. Did you leave the house after you saw this man run?

A. Yes.

Q. Did any one stay behind?

A. Yes.

Q. Who?

A. Reazor Cain and Oscar Bearden.

Q. Did they wait?

A. They waited and brought him in in about an hour and a half. We came to the door when they brought him up there.

Cross-examination.

By Mr. Belden:

Q. You were an officer?

A. Yes.

Q. In what capacity?

A. Constable.

Q. What took place in the sheriff's office that night when he was arrested? Or in the little room next to it?

A. They brought him in, McKinzie and Williams and the highway patrolman questioned him. While we was there the sheriff came in and told us we had the wrong negro, an innocent negro, or something.

Q. What else did the sheriff tell you at that time?

A. That is all I remember.

Q. Didn't the sheriff at that time tell you to stop whipping him?

A. No sir.

Q. And take him to the jail?

A. No sir.

Q. You are sure?

A. Yes.

Q. Were you present in the county attorney's office that [fol. 258] night when they obtained the confession?

A. The biggest part of the time, I was.

Q. Where did Reazor Cain stand with reference to where the defendant was sitting?

A. The night they got the confession, I don't believe

Cain was in there. If he was he was in and out.

Q. Are you sure about that?

A. To my best knowledge, yes.

Q. Who was there?

A. There was Cheatwood, Harvey Hawkins, and Jess Faulkner, Norman Horton, and Buddie Gee.

Q. How about Floyd Brown?

A. If he was there, he was in and out, you might say there wasn't any of the sheriff's department until the sheriff came in. The sheriff came in later.

Q. When did you first go up there that night?

A. I was up there when they brought the boy in.

Q. About what time was that?

A. That was the early part of the night.

Q. How long did you stay?

A. I stayed until they got the confession.

Q. What time was that?

A. Somewhere around midnight, or a little after.

Q. Somewhere around midnight or later?

A. Yes.

Q. Who was questioning him?

A. Norman and Buddie and Cheatwood, practically all of us, but the county attorney, and the assistant, and Cheatwood were doing the biggest part of the questioning.

Q. Where was Cheatwood sitting with reference to the defendant?

[fol. 259] A. The defendant was sitting here, and Cheatwood here, a part of the time, and the county attorney was here, a part of the time (indicating).

Q. How close was Cheatwood sitting?

A. He didn't stay in a certain place.

Q. At any time, how close was he? Was he right at him a part of the time?

A. At a time he was close enough to put the pan of bones in his lap. He was close enough for that.

Q. And Cheatwood was the man who put the pan of bones in his lap?

A. Yes, I believe he was.

Q. In this case, the County Attorney has mentioned a strap—

By Mr. Horton: I object to that. I mentioned that in the absence of the jury.

By the Court: Sustained.

Q. Did you see a strap in the hands of Mr. Cheatwood, and tapping the defendant on the knee?

A. Not while I was in there.

Q. Not while you were in there?

A. No sir.

Q. Did you hear any rough language used?

A. No, they never abused the negro at all while I was there.

Q. Did not use any rough language?

A. Not while I was in there.

Witness excused.

By Mr. Horton: At this time I offer this gun in evidence.

By the Court: It may be admitted.

By Mr. Belden: We object to the introduction of State's Exhibit Three. Introduced for what purpose?

By the Court: Introduced as the gun used in the case. [fel. 260] By Mr. Belden: We certainly object to it as being the gun used to commit the murder. There is no evidence to that effect now.

By Mr. Horton: The gun that this defendant was carrying around.

By Mr. Belden: O, well—

By the Court: Overruled.

By Mr. Belden: Exception.

ENNIS AIKEN, in behalf of the State of Oklahoma in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. State your name.

A. Ennis Aiken.

Q. Where do you live?

A. I live in Texas.

Q. Where did you live in January, 1940?

A. In the Belmont Addition in Hugo, Oklahoma.

Q. Do you know W. D. Lyons?

A. I don't know him at present.

Q. Did you know him at that time?

A. I seen him a few times. I just know him when I see him.

Q. Did you know where he lived?

A. I didn't know exactly where he stayed.

Q. Did you know where his mother-in-law lived?

A. Yes sir, I know where his mother-in-law lived.

Q. Do you remember when the officers arrested him that night?

A. I remember when the officers arrested him that night.

Q. Did you see him?

A. I seen him up the road, but didn't know what he was doing.

[fol. 261] Q. What was he doing?

A. Sitting on the edge of a field.

Q. Did you see some cars go up to his mother-in-law's house?

A. I saw some cars go up to his mother-in-law's house.

Q. How many?

A. I couldn't tell how many.

Q. Was there more than one?

A. I wouldn't know that, just some cars, I didn't count them.

Q. Did you see the defendant after the cars drove off?

A. No sir, I seen him before they drove off.

Q. Before they drove off?

A. Yes sir.

Q. Did you talk to him?

A. He asked me to go to the house and ask his wife what the trouble was down there.

Q. What did you do?

A. I went and asked her and she told me the laws was after him, for to go back and tell him the laws was gone, to come back.

Q. And for him to come back home?

A. Yes sir.

By Mr. Belden: We object to anything his wife told him as not binding on this defendant.

By the Court: Overruled, exception allowed.

By Mr. Belden: It was hearsay and not in the presence of this witness.

By the Court: I misunderstood the testimony then.

By Mr. Belden: Any testimony of the wife would not be admissible in a case of the wife against her husband.

By Mr. Horton: I will ask it this way—

By Mr. Belden: Wait.

By the Court: Strike that, and the jury is instructed [fol. 262] not to consider it for any purpose.

By Mr. Horton:

Q. What did W. D. Lyons tell you to do?

A. He asked me to go to the house and ask his wife what was going on.

Q. Did you do it?

A. Yes sir, I went and asked her.

Q. Did you go back and tell the defendant anything?

A. I never did see him. Never did see him after that.

Witness excused.

BIRD COLLINS, in behalf of the State of Oklahoma in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. What is your name?

A. Bird Collins. Clyde is my right name.

Q. What position do you hold in Choctaw County?

A. Deputy sheriff.

Q. Were you a deputy sheriff in January, 1940?

A. No sir.

Q. Do you remember when the Rogers murder case happened?

A. Yes.

Q. Do you remember when the house burned up out in the pasture?

A. Yes.

Q. Did you hold any official position at that time?

A. No sir.

Q. Did you go to the place where the house was burning?

A. Yes.

Q. Did you see the bodies there?

[fol. 263] A. Yes sir.

Q. Had the house burned up when you were there?

A. Yes, the people were standing away back when I got there.

Q. Was there a pretty good crowd of people there when you got there?

A. There must have been 25, or 30, or 40.

Q. Did others come?

A. They kept coming.

Q. Could you estimate the number of people who came that night?

A. I guess there was 200.

Q. Were there any people there when you got there?

A. We were in the fifth car.

Q. How much of the house had burned down at that time?

A. All of the house.

Q. About what time was it when you got there?

A. It must have been around seven thirty.

Q. Do you recall the condition of the weather at that time?

A. It was a pretty cold night.

Q. Do you remember what the weather was the following day, or the next day, the next two or three days?

A. I think there come a little rain, and a snow in the next few days. It was pretty bad, awfully bad weather.

Q. Do you remember whether they had a pretty hard freeze?

A. After that rain, yes.

Witness excused.

HARVEY HAWKINS, in behalf of the State of Oklahoma in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. What is your name?

A. Harvey Hawkins.

[fol. 264] Q. Are you the same witness who testified in this case before?

A. Yes.

Q. Kill that. I don't believe he testified before the jury before.

By the Court: I don't think so.

Q. Mr. Hawkins, what position do you hold?

A. State highway patrolman.

Q. Were you such state highway patrolman in January, 1940?

A. Yes.

Q. During that entire month?

A. Yes.

Q. Where were you stationed at that time?

A. I was stationed here at Hugo.

Q. Do you remember when the Rogers murder case occurred and these people got killed and burned down there?

A. Yes.

Q. Did you help make the investigation in that case?

A. Yes.

Q. Do you know the defendant, W. D. Lyons?

A. Yes.

Q. Do you remember when he was arrested?

A. Yes.

Q. Do you remember the occasion when he was taken out of jail and taken to the scene of the crime?

A. Yes.

Q. Who went with him, as you recall?

A. Buddie Gee, assistant county attorney.

Q. Did you go along?

A. I did. I went and Vernie Cheatwood from the Governor's office, Buddie Gee, the assistant county attorney.

Q. Was Floyd Brown?

[Vol. 265] A. Floyd Brown, the undersheriff, and the defendant.

Q. I hand your State's Exhibit Ten, and ask you to identify that. Can you state what that is?

A. That is the axe I dug up under the ashes of the Rogers house.

Q. How did you come to dig it up?

A. The defendant—

By Mr. Marshall: Now, if your Honor, please, I object to that because it is quite obvious that he is about to go into what amounts to a confession. Where a witness, a defendant, is questioned, and not in any manner pointed out that the evidence would be used against him, it is a form of confession. You ruled out the first confession yesterday, and anything coming as a result of it is not admissible in this Court at this time.

By Mr. Horton: This is no part of the first confession that we are talking about.

By Mr. Marshall: We object to any statement made to him concerning anything about the crime at that time where

it was made as the result of force and violence and is therefore not admissible in this court as evidence at this time.

By Mr. Horton: May be I can ask the question in a little different form:

Q. Did you know where that axe was before you got it?

A. No, sir.

Q. How did you find out where it was?

A. The defendant told me where it was.

By Mr. Marshall: Now, if your Honor, please, we object and ask that it be stricken from the record for the same reason that we objected to the other answer.

By the Court: Overruled. Exception allowed.

Q. Was the defendant present at that time?

A. Yes.

[fol. 266] Q. Was he being beaten?

A. No.

Q. Was force being used on him?

A. No.

Q. Tell the jury what happened?

By Mr. Marshall: If your Honor, please, at this point for the purpose of the record, we wish at this time to show to the Court by evidence the same as was shown yesterday; that any statements made by this defendant were made at that time as the result of force and violence used on him by the officers in this county, and therefore any statements so made at that time were in the form of extortion and torture by force and violence, and if admitted, would be a denial of due process of law under the Fourteenth Amendment to the United States Constitution.

By the Court:

Q. When was this trip made down there when the axe was found?

By the Witness: On the morning of January 22, 1940.

By the Court:

Q. January 22, 1940?

By the Witness: Yes, sir.

By the Court:

Q. In whose custody was the defendant at that time?

By the Witness: He was transported down there in the patrol car. He was in the custody of the Assistant County Attorney, Floyd Brown, the undersheriff, and I.

By the Court:

Q. Was that before or after he was taken to the penitentiary for safe-keeping?

By the Witness: That was before.

By the Court: Objection overruled, exception allowed.

By Mr. Horton:

Q. Without testifying to any statements made by the defendant, or any conversation had with him at that time, or prior to that time, just tell what happened on the scene [fol. 267] of the crime on the day that he went down there in company with you and Floyd Brown and Mr. Gee.

A. When we reached the scene of the crime, the defendant and I stood east of the house, and Vernie Cheatwood was standing over north of the east end of the house.

Q. Where was that?

A. That was at the location of this big spot of blood where the woman had lain at the time of the crime.

Q. Was there any marker there besides the blood?

A. This spot was covered with a tub, and the defendant in custody, had on handcuffs, held out his hand this way and pointed to the location.

Q. Did he point?

A. Yes.

By Mr. Marshall: If your Honor, please, we object to that question, also to anything that the defendant did at this time and we ask to ask one preliminary question?

By the Court: You may ask him.

By Mr. Marshall:

Q. Were you in the office when the defendant here is alleged to have made a statement in the county attorney's office?

A. I was in the office a part of the time.

Q. Were you there when the statement was actually made, or any part of it?

A. In part, yes.

Q. How long after this statement was made was it that you were out at the scene of the crime?

A. It was a few hours. The time of the statement was shortly after midnight.

Q. And just after dawn you were out there?

A. Yes. We waited for daylight to go.

[fol. 268] By Mr. Marshall: In view of the fact that at the time the defendant was there it was a few hours after the time he is alleged to have made the statement which has been excluded in this case, we object to any statement made by the witness as to what the defendant did or said—

By Mr. Horton: The Court has ruled on that, if your Honor, please.

By Mr. Marshall: But, if your Honor, please, may we for the purpose of the record, I am making my objection—at the scene of the crime, of this visit they are testifying about, made a few hours after whatever appeared to occur in the prosecuting attorney's office, on the ground that any act or statement made by the defendant, were made or said as the result of treatment he received in the office which was sufficient to deprive him of moving in a voluntary manner, or acting in a voluntary manner, and that the use of said statement deprives him of due process under the Fourteenth Amendment to the Constitution of the United States.

By the Court: Overruled, exception allowed.

Q. Continue and tell what happened.

A. When he pointed to this location, in this manner, Floyd Brown took the pick and located the spot to which he pointed. When Floyd put the pick on the ground to mark it the defendant motioned him a little further south. He stepped over with the pick far enough that the defendant said that was about right. Floyd marked the spot with the pick.

Q. Did he walk out to the wood pile?

A. Yes, he was standing by the wood pile.

Q. Which way was that from where the house had been?

A. It was east.

Q. Did he walk to the place where the woman's body had lain?

A. Yes.

[fol. 269] Q. Where the blood was covered with the tub?

A. Yes.

Q. Where was that tub from where the house had been?

A. Just north of the east end of the house, north of where the porch was.

Q. Northeast of the house?

A. Northeast, a little off.

Q. Who dug down into the ground on the spot where the house had stood?

A. Floyd Brown and I both dug some.

Q. Were there any ashes there?

A. Yes.

Q. What did you find?

A. We found this axe.

Q. How can you identify that as being the axe?

A. These places look like it had been used like a sledge hammer, or something. It is dented. Here is one particular mark, where there is a gap pieced off on that iside. That is one of the easiest things. Both the sides are dented, but this one slopes off. That I remember.

Q. What condition was the axe in when you found it?

A. Ashes and dirt caked on it.

Q. What position was it lying in?

A. Lying in this manner (indicating), east and west.

Q. The blade east and west?

A. This part south, and the handle would have been pointing south.

Q. Was the handle there?

A. The handle wasn't in there. There was some charred remains of the handle here, a small amount left there.

Q. Anything else?

[fol. 270] A. A little piece of steel, looked something like a piece of sickle blade.

Q. Was the ground frozen at that time?

A. It was during a hard freeze.

Q. Did you see any other marks there on the ground?

A. Just the print of this, lying on the ground, in kind of a hollow place, like you might see under a house, that sink perhaps caused by chickens or something. This was lying down in there, in this fine grit or dirt and silt under the house. It was a hollow as thick as the axe and the axe was —the dust kind of came up on it.

Q. Was it caked in axe?

A. Yes.

Q. Did you find the shells at that time?

A. I did not go with them.

Q. What was done in reference to the shells?

A. The defendant said he would show them to us but I drove the car down the road and sat there while Vernie Cheatwood and Floyd Brown went to get the shells. I saw them but I didn't go.

Q. Who was present when you left there?

A. Buddie Gee, Floyd Brown, Vernie *Chatwood*, Vernon Colclasure, and the defendant.

Q. And you left and went to town?

A. I drove south and down to the pasture gate, to the highway, and drove a short distance east to be directly south from where they were and would come out of the pasture from the place he showed them the shells would be.

Q. You drove toward Fort Towson?

A. So I would be closer.

Q. How far were you from the corner of the pasture where the river road runs north and south?

[fol. 271] A. I don't recall. We were about 200 yards east of the gate.

Q. How close were you to the railroad track.

A. It was right across from us a short distance. We were north of it.

Q. How deep in the ashes was this axe blade?

A. The ashes were about six inches, the ashes on top of it. And the axe under the ashes and the ashes on top of it.

By Mr. Marshall: May it please the Court, we renew our objection and ask that what he said Lyons did be stricken from the record for the reasons given before.

By the Court: Overruled, exception allowed.

• Cross-examination.

By Mr. Marshall:

Q. Mr. Hawkins, when was the first time you saw Lyons?

A. I saw Lyons the night he was arrested.

Q. Where did you see him?

A. In the sheriff's office.

Q. Who else was present?

A. I don't know. There were several around there. The sheriff was there, and Howard Rorie, Jess Faulkner, I don't remember who else.

Q. Was Mr. Reasor Cain there?

A. I think he was.

Q. Did you see anyone strike the defendant?

A. I did not.

Q. Did you hear anyone curse him?

A. No.

Q. Were they questioning him?

A. Yes.

Q. Did you take part in the questioning?

A. No, I didn't.

Q. What type of questions were they asking him?

[fol. 272] A. They were asking him about some shot-gun, where they had that.

Q. What else were they asking him?

A. They were asking him regular questions about where he was on that occasion, at that hour, and what he had been doing going across the pasture the last few days.

Q. Did they ask the defendant did he commit the crime?

A. They did.

Q. Did he confirm or deny it?

A. He denied it at that time.

Q. When was the next time you saw him?

A. At the time he was being questioned in the county attorney's office.

Q. How did you happen to be there?

A. I knew that he was being questioned, that it was the intention to question him, and I was working. I came in and I went up there.

Q. How did you happen to know about it?

A. They told me they were going to question him.

Q. Do you remember who told you?

A. It was discussed in the county attorney's office before I left.

Q. Did they say they were going to get a confession out of him?

A. Didn't hear anything said about that.

Q. Was Mr. Cheatwood there at that time?

A. Yes.

Q. You did not come in until after the questioning was started? Were you there when they brought Lyons in?

A. I was not there when they brought him in.

Q. Were you there when they questioned him?

A. A part of the time.

[fol. 273] Q. How many were in there?

A. Three or four or five. They didn't stay in there all the time.

Q. Coming in and out?

A. Yes.

Q. Who was questioning him?

A. Mr. Cheatwood and the County Attorney principally.

Q. Anybody else?

A. There were suggestions made but questions were not asked by others.

Q. As a matter of fact, didn't you take part?

A. No, I did not.

Q. Do you know anybody who did besides those you named?

A. No, not that I consider took any part.

Q. The other patrolman? Was he there?

A. Yes.

Q. Did he do any questioning?

A. I don't recall any questions he asked.

Q. Did you see anyone strike Lyons with anything?

A. No.

Q. Did you see anyone slap him with bare hands?

A. No.

Q. Strike him with their fist?

A. No.

Q. Did anybody have a blackjack in his hand?

A. I didn't see one.

Q. Did you see Mr. Cheatwood?

A. Did I see him?

Q. During that night? During the questioning?

A. Yes.

Q. Where was he seated?

[fol. 274] A. He was seated, I recall, sitting on the west side of the county attorney's desk. He sat at different places. He was not in one location.

Q. Did you see him at any time seated immediately in front of Lyons?

A. I don't recall about that, whether he was directly in front of him or not.

Q. Did you see him strike him down or tap him around his knees with anything?

A. No, I did not.

Q. His legs, his arms, or any place?

A. No.

Q. Was he questioned in the regular tone of voice? Was anybody yelling, are just like you and I are talking now?

A. Probably in the same manner that you and I are talking now. Nothing unusual.

Q. Did there come a time when Mr. Cheatwood got a pan of bones and set them in Lyons' lap?

A. I don't know about that.

Q. Could that have happened in the room and you not see it while you were there?

A. It could have happened when I was out. It couldn't have happened while I was in the room.

Q. While Mr. Cheatwood was questioning Lyons, did you see Mr. Cheatwood's hands?

A. Yes.

Q. Did he have anything in them?

A. No, not at the time I saw him.

Q. You were watching kind of closely, weren't you?

A. I was observing things that occurred.

[fol. 275] Q. Could anybody have struck him while you were there and you not have seen it or heard it?

A. Couldn't have.

Q. And nobody hit him while you were there?

A. No.

Q. You went away and came back?

A. I did.

Q. About what time did you come back?

A. It was around midnight. I wasn't back here very long after I came back until they took him to jail. It was approximately midnight.

Q. Was it the same morning after you took him to jail that you carried him to the scene where you obtained the axe?

A. Yes, the same morning.

Q. Did you bring him back to jail?

A. Yes.

Q. What happened?

A. He was put in jail.

Q. Didn't you take him and a group of you have a picture taken?

A. I don't know about that. My picture was not taken. I went home and went to bed.

Q. You don't know anything that happened that day? Were you there when he was taken to Antlers?

A. No.

Q. You don't know anything about that? When was the next time you saw Lyons?

A. The day of the preliminary hearing.

Q. Getting back to when you were first at the scene of the crime, how did you happen to be interested in the case? Were you requested?

[fol. 276] A. I am an officer. I have been an officer, a salaried State officer for approximately ten years. I am a citizen of Southeast Oklahoma, and a citizen of a near-by and adjoining county. As an officer and as a citizen, it was a duty of mine to work on the case. I worked on several cases, several years ago.

Q. My question was specifically, whether or not anyone asked you.

By Mr. Horton: We think that is immaterial. That was a matter of general interest.

By Mr. Marshall: I come again to the point where I think we are at any time permitted to go into the possible motive of a witness for his testimony.

By Mr. Horton: He is taking the position that all these officers were butting in, and with no constituted authority in the affair to discuss the unravelling of this crime. It was a matter of so vital interest that every officer and citizen was interested in the solution, and you take the attitude that the man was butting in where he did not have any interest to bring to light the hidden things of darkness.

By the Court: He might answer the question as to whether he was invited, or whether he volunteered his service. I think a man who volunteers his service to help solve a mystery is just as honorable as if he were a deputy.

Q. Mr. Officer, can you tell us whether or not anyone asked you to come into the case?

A. Van Raulston, the field deputy, called the police station, and left work for me to assist him.

Q. Were you requested by State officials to help in the case?

A. No, but I would have been fired from the state patrol if I had not been working.

Q. But did anyone of the State officials ask you to investigate the case?

[fol. 277] A. Mr. Cheatwood did. As the Governor's investigator, he called on me to work directly with him during this investigation.

Q. Did you, when you went to get the axe, the time I am talking about, to fix it in your mind, did you go as the result of anything that you learned during the night that Lyons was being questioned in the county attorney's office?

A. I did.

Witness excused.

Roy Marshall, recalled by the defendant for further cross-examination, testified as follows, to-wit:

Re-Cross Examination.

By Mr. Marshall:

Q. Mr. Marshall, on the night that this building was burned, Mr. and Mrs. Rogers' home, weren't you with Mr. Van Raulston that night when he got injured?

A. Yes.

Q. I mean, have you been interested in this case from that time?

A. No, Van and I were riding around when they called for the deputy sheriff and I went with him.

Q. Just to see what was going on?

A. Yes.

Q. Did you take any other part in it?

A. No, only when they took the boy to McAlester.

Q. That is the only time?

A. Yes.

Witness excused.

[fol. 278] FLOYD BROWN, in behalf of the State of Oklahoma in chief, after being duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Horton:

Q. State your name.

A. Floyd Brown.

Q. What position did you occupy in 1939?

A. Deputy sheriff.

Q. Were you such deputy sheriff in January of that year?

A. Yes.

Q. Do you recall when the Rogers, Mr. and Mrs. Rogers and little child were murdered and the house burned, this side of Fort Towson?

A. Yes.

Q. Do you know the defendant, W. D. Lyons?

A. Yes.

Q. Did you ever go down there with him to Fort Towson to where the house burned?

A. Yes.

Q. And those people were killed?

A. I did.

Q. Did you find the axe down there?

A. Yes.

Q. Would you know that axe if you saw it again?

A. Yes.

Q. I will ask you if that is it, if you know?

A. Yes.

Q. How do you identify that as bein- the axe?

A. I cut holes right close to see if I could see blood stains. [fol. 279] I remember a bunch of picked places on each side of, and it looked like one side of the blade had been gee'd up like that.

Q. How long was it after the murder of those people was it that you found the axe?

A. It was a good while.

Q. About how long?

A. It was around three weeks.

Q. Where was the axe, Mr. Brown?

A. It was on the east side of the house, where the house was.

Q. Where the house had been?

A. Yes.

Q. Did you get down there the night of the murder?

A. No sir, I never did.

Q. Do you know where the east window was in the house?

A. No, I did not.

Q. Where did you find the axe?

A. We had to dig down to find it.

Q. Dig down to find it?

A. Yes.

Q. Tell the jury what you found and how it appeared.

A. There was a snow on the ground at the time we dug it up, seems like the ground was froze a little, as hard as it could be. I didn't know, I never had been to the house

before when it was up. W. D. stood off out there and we had to step off the place.

By Mr. Marshall: We object to that, or anything that the witness might say or use on what W. D. Lyons said or did, on the same ground as mentioned before.

By the Court: Overruled, exception allowed.

Q. Go ahead.

A. We started scratching, digging around, and in a little bit, Harvey Hawkins had a little shovel, spade looking [fol. 280] instrument, he hit something, said it was something solid, I believe it is that axe.

By Mr. Marshall: We object to something he may have said.

By the Court: Sustained.

A. I got to raking the dirt back and it was the axe and Harvey picked it up.

Q. How was it imbedded?

A. There was ashes over it and kind of caked, like it had been kind of rained on, kind of clustered over it.

Q. Did you find the shells on that day?

A. Found the shells about a half a mile from the house.

Q. In which direction?

A. It was south, a little southeast.

Q. What kind of shells were they?

A. Twelve gauge.

Q. What color were they?

A. They were red.

Q. About how far from the house were they?

A. About a half a mile.

Q. Was that between the house and the railroad track?

A. Yes.

Q. How far from that road that goes to the river by that pasture?

A. About two or three hundred yards from the road to the south.

Q. Would you know those shells if you saw them again?

A. Yes.

Q. How would you know them?

A. When they were picked up Cheatwood made a mark on them with a pen, marked with a pen.

Q. How did he mark them?

[fol. 281] A. I think he put V C on them.

Q. Put his initials on them?

A. Put his initials on them.

Q. I hand you State's Exhibits Eleven and Twelve and ask you to identify them if you can?

A. Yes sir.

Q. What are they?

A. The shells that were picked up.

Q. Where were they picked up?

A. By a post. Picked up by a post about a half a mile from this burned house.

Q. How many fences were there?

A. The fence between—one fence between this fence and the house.

Q. Was there another fence?

A. Another fence between that fence and the highway.

Q. Three lateral fences running east and west between this house and the highway?

A. We went down one fence about a hundred yards, crossed and went about a hundred yards to where the shells were found.

Q. And the first fence back north?

A. Back south of the highway, I believe there is a fence on the highway.

Q. There is a fence along the highway, and the first one back north from that on the highway?

A. Yes.

Q. Were there any bushes, trees, or undergrowth around there?

A. Two trees.

Q. How many trees were there?

A. A few scrubby looking trees, I just remember two trees.

Q. What was the general condition of that landscape as to trees?

[fol. 282] A. No, it was a clearing for half a mile from the fence to the house.

Q. Was the house in a clearing?

A. The house was.

Q. What kind of place was around the house?

A. It was barren.

Q. Field or pasture?

A. Looked like it lay out a year or two. Didn't look like there was anything out there.

Q. Did you go with Mr. Cheatwood and Mr. Hannon when the- fired this gun here a few days later?

A. No sir.

Q. Do you know in whose custody these shells were after they were found down there?

A. They were turned over to the sheriff.

Q. Do you know what he did with them?

A. I believe he turned them over to the county attorney's office.

Q. Did he turn them back to Cheatwood?

A. I believe he did.

Q. Was the defendant present when those shells were found?

A. Yes.

Q. Did you — directly to the place where they were found? Tell how you found them.

A. We went close to them and he said they should be between these two trees.

By Mr. Marshall: Now——

By Mr. Horton: Not what he said, but from the time you left the house, how did you go? Did you walk?

A. We went down the fence row about a hundred yards and crossed over the fence and went across this kind of [fol. 283] prairie or field. And went to the place.

Q. Did it resemble a pasture in any way?

A. Yes.

By Mr. Belden: Court please, we are going to ask that the County Attorney stop leading the witness.

By the Court: It is a hard matter to get the witness to say whether that is land, sea, clearing, or what.

By Mr. Belden: If he doesn't know, it is all right, but we object to the County Attorney leading him.

By the Court: If he knows.

A. He went to the place. We went to the place.

By Mr. Marshall: Who went to the place? I didn't get it.

A. We did.

Q. How were these shells lying, Floyd?

A. Together, like this, and a little—looked like long grass twisted around them, and put in a post hole, that far down, a kind of a hole.

Q. In a post hole.

A. Down by a post.

Q. A sunk place there in the grass?

A. Looked like grass had been kind of twisted around these.

Q. They were not lying on top of the ground?

A. No sir.

Q. Are those shells now in the same condition as they were when you found them?

A. Yes sir, were crumpled up like that, just like they had been squeezed.

[fol. 284] Cross-examination.

By Mr. Belden:

Q. Now, Mr. Brown, you are certain that these are the shells?

A. Yes sir.

Q. No question in your mind about that now?

A. No sir.

Q. Mr. Brown, as deputy sheriff, you participated in the questioning of this defendant in the county attorney's office?

A. No sir, I never questioned him at no time.

Q. Never did ask him a question?

A. I never did.

Q. You were present?

A. I was present a part of the time.

Q. What time was it that you first went there that evening?

A. The first time was around nine o'clock.

Q. Who was there?

A. Cheatwood, Howard Rorie, I believe Roy Harmon was there, and Harvey Hawkins, and I think one or two that I don't remember.

Q. Some six or seven?

A. Something like that.

Q. What was going on?

A. They were questioning him?

Q. Who was questioning?

A. Cheatwood.

Q. Questioning who?

A. W. D.

Q. What about?

A. About this murder down here.

Q. What did he ask him?

A. He just asked him about what he was doing out there with that gun.

[fol. 285] Q. Was anything said about an axe?

A. Not right then.

Q. During the night, while you were there?

A. When I came back was after he made his confession. He told what he did with it.

Q. Who told what? Do you mean that Lyons made any reference to the axe in the confession?

A. When W. D. said he could take us to where the axe was.

Q. Was that a part of the confession?

A. I don't know about that. That was after this was supposed to have been made. We were talking about it and he said he could take us to where the axe was.

Q. You were talking—

A. W. D. told us.

Q. Where were you?

A. That was in the county attorney's office.

Q. At what hour? What time was that?

A. Around two o'clock, I would say.

Q. In the morning?

A. I don't remember the exact date.

Q. And he told you where the axe was?

A. He said he could tell us where they put the axe, he could show us where they put the axe.

Q. How did it come that there was any discussion about the axe?

A. They were asking him what he did with the axe.

Q. Why did they ask him about an axe?

A. There had been an axe used.

Q. And they knew there had been an axe used?

A. The bodies were cut.

[fol. 286] Q. And they had information that there was an axe before they questioned him?

A. And that axe was one that was on the place.

Q. And they were asking him about an axe?

A. Yes.

Q. You say that some time before nine o'clock, you went up and they were questioning him?

A. It was about nine o'clock when I first went up there.

Q. And you say that it was around two o'clock that you were there and they—

A. I was there off and on all the time.

Q. And they questioned him all that time?

A. Well yes, I imagine they did.

Q. Did you hear him deny that he knew anything about the murder?

A. He wasn't saying anything, just sitting there when I first went up there, just sitting there.

Q. Did you hear him deny to start with that he knew anything about the murder?

A. No sir, I did not hear him deny it.

Q. How long were you there the first time?

A. The first time?

Q. Yes.

A. I stood in the door. I never did get in where they were sitting around him. I stood in the door, or close to the door.

Q. How long did you stand there?

A. About fifteen or twenty minutes.

Q. What were you standing there for?

A. Listening.

Q. Could you hear what was being said?

[fol. 287] A. Yes.

Q. And he didn't answer any questions during that time?

A. Not about that, no.

Q. What did he answer any questions about?

A. He said I don't know, or grunted. He never would talk.

Q. What finally induced him to talk?

A. I don't know.

Q. Later, during that time, you saw the pan of bones brought there?

A. Yes.

Q. And put on his lap?

A. Yes.

Q. Where did those bones come from?

A. Down at this place where the house was burned.

Q. Do you mean they were the bones taken from where the house was burned?

A. That is right.

Q. And they put them in a pan and put them on his lap?

A. Yes.

Q. And it was some time after that that he confessed, is that right?

A. Well, it was a little while after that that he made the confession. Yes.

Q. Mr. Brown, now why did you go to the scene of the crime that morning after this confession, the same morning of the confession?

A. I was going to look for the axe.

Q. What axe?

A. That axe he said he was going to take us to.

Q. That axe that he talked about in the confession?

A. I didn't hear that. After we got through talking he said he would take us to where they put the axe.

Q. Was that before or after the confession was made?

[fol. 288] A. After he had told the county attorney about that. It was after several had gone and he kept talking and said he could show where they put this axe.

By Mr. Belden: Now, if the Court please, at this time comes the defendant and asks that all the testimony with reference to this axe be stricken from the record and the jury admonished not to take it into consideration for the reason that it is shown that it is a part of the confession and therefore having been obtained under force and violence to permit it to be introduced in this case is a violation of this defendant's Constitutional right, and a violation of the Fourteenth Amendment to the Constitution of the United States for due process of law.

By the Court: Overruled. Exception allowed.

Q. Mr. Brown, about two o'clock in the morning—strike that, please. Can you give the day of the month it was that this confession was obtained in the county attorney's office?

A. Well, I don't know the exact date. It was up in the 20th some time.

Q. Mr. Brown, you say that was about two o'clock in the morning that he was still in the county attorney's office, is that right?

A. Yes.

Q. Was he still there when he left?

A. I went back to the sheriff's office, and we were going out to pick up another fellow. I don't remember now.

Q. But they were there for some time after two o'clock the next morning, after two o'clock on the same day that you went to the scene of the murder?

A. The next morning?

Q. After daybreak on the same day?

A. Yes, that is right.

Q. And you went to the scene of the murder?

[fol. 289] A. Yes.

Q. How long did you stay there?

A. We stayed there, I guess, at the house about thirty minutes, I guess.

Q. These two shells, you say you went about a half a mile from the house to find them?

A. Yes.

Q. In what direction?

A. Went southeast, just a little bit east of south.

Q. How?

A. South and a little east.

Q. Mostly south?

A. Yes.

Q. About a half a mile?

A. Yes.

Q. Was that in the direction that this boy's mother lived, her home?

A. Well, that was the way to the highway or the railroad. I never have been to his mother's place.

Q. You don't know where she lives?

A. No.

Q. Why did you go over there?

A. To where the shells were?

Q. Yes.

A. That is where he placed them.

Q. When did he say that?

A. He said that on the way down there. He was telling about where he put the shells.

Q. Was anything said about the shells in the county attorney's office?

A. Yes.

Q. What was said about them?

[fol. 290] A. I don't know just what was said about them.

Q. Did he confess any where that there might be some empty shells?

A. Yes.

Q. And as the result of that you went a half mile south of the Rogers house to find them:

A. He did not tell me. I heard it.

Q. From whom?

A. I heard them talking about it in the county attorney's office. And on the way down there.

Q. Who did you hear?

A. I heard the ones around the office talking about it.

Q. That he told them up there?

A. No, not that he told them. That was after he had made this confession.

Q. You mean that there wasn't anything about these shells in the confession?

A. I did not hear the confession when it was made to the county attorney.

Q. You don't know whether he said anything about the shells in the confession?

A. Yes, there was something said about them.

Q. Something said about that in the confession? If the Court please, at this time the defendant asks that the evidence as to State's Exhibits Eleven and Twelve be stricken from the record and the jury admonished not to consider that part of the evidence in this case for the reason that whatever information they obtained, they obtained through a confession which was brought about as the result of fear, force, violence, and therefore is a violation of this defendant's Constitutional rights.

By the Court: Overruled, exception allowed.

[fol. 291] Q. Now, did you say you were present at the time that the county attorney mentioned—when he said that Cheatwood was using a strap and was tapping the defendant on the leg?

A. No sir.

By Mr. Horton: We object to that reference being made in the argument in the absence of the jury.

By the Court: Sustained, it was in the absence of the jury.

Q. Was anything used?

A. Not while I was there. I didn't know of it. I did not see anything used, no.

Q. Did you hear cursing and threats?

A. No sir.

Q. There wasn't any cursing?

A. There wasn't anyone cursing, no, there wasn't.

Q. Wasn't any cursing during that time?

A. No.

Q. About two o'clock in the morning was the last you saw of the defendant in the county attorney's office, is that right?

A. No, I saw him awhile after. After we brought Van Bizzell in.

Q. What time was that?

A. I imagine it was about an hour later.

Q. Did you say that was about daylight?

A. No, it wasn't daylight.

Q. When it got daylight, did you and the others take the defendant to the Rogers place?

A. Yes.

Q. After you brought him back from the Rogers place what was done with him?

A. He was put back in jail.

Q. Did you, that same day, take him to Antlers?
[fol. 292] A. Yes.

Q. About what time did you leave with him?

A. It was in the afternoon.

Q. In the afternoon?

A. Yes.

Q. You took him to Antlers?

A. Yes.

Q. About what time did you arrive there with him?

A. I don't remember. It was up in the afternoon.

Q. Do you know who took him from there to — penitentiary?

A. Van Raulston and Roy Marshall.

Q. Do you know when they took him?

A. It was the following day.

Q. The following day, or that day?

A. The best I remember, it was the following day.

Q. Do you know?

A. Yes. I didn't see them leave with him, I know they said they were going to take him up there.

Q. You don't know when they did take him out?

A. I wasn't there, no.

By Mr. Horton:

Q. This confession that he is talking about is not the confession that was made in McAlester, is it?

A. No.

Q. Do you know anything about that confession?

A. No sir, not a thing.

Q. Were you present when it was made?

A. No.

Witness excused.

[fol. 293] ROY DEERING, in behalf of the State of Oklahoma in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. What is your name?

A. Roy Deering.

Q. Where do you live?

A. Fort Towson.

Q. Where were you living on the night of December 31, 1939?

A. Mr. Hall's place, a mile west of Fort Towson.

Q. Do you know where Mr. Elmer Rogers and his family lived?

A. Yes.

Q. How far did they live from you?

A. East.

Q. About how far?

A. About a quarter and a half a quarter east of my house.

Q. How long had Mr. Rogers and you been neighbors?

A. Four months.

Q. Did you ever use his axe?

A. No sir.

Q. Did you ever see his axe?

A. Yes, sir.

Q. Where did he keep his axe?

A. I knew his axe. He kept it at the wood pile.

Q. Do you remember where his wood pile was?

A. When he lived north of me on the road, that is where I knew the axe.

Q. You could identify that axe if you saw it, could you?

A. Yes.

Q. I hand you State's Exhibit Ten and ask you to identify that if you can?

[fol. 294] A. That is the axe he used when he lived north of me.

Q. How do you identify it?

A. By this notch on it and the way it is ground.

Q. How is it ground?

A. From this eye. It is ground more here than it is on the other side.

Q. How did you happen to know that axe?

A. I was waiting for him when I worked for Mrs. Stokes. He was cutting wood and I noticed the axe.

By the Court: I did not get the answer.

Q. Just repeat the answer. Tell the Court and the jury how you knew it.

A. When him and I was working together for Mrs. Stokes in the meantime I was going by his house, going through the woods to where she lived at her place. He had his axe at the wood pile. Some mornings I got there before he chopped wood for his wife to cook dinner. I would wait at the wood pile while he chopped wood, and I noticed his axe.

Q. Tell the jury, for fear they di-n't hear it, about where that axe is ground.

A. On the inside, the lower side, next to the handle, it is ground a little more than on the front part on the end.

Q. What other means can you identify?

A. Those notches. It has been used as a sledge for driving.

Q. You mean the pits on the side of the axe?

A. Yes.

Q. Was it pitted on both sides?

A. Yes. It had been used as a sledge hammer, driving something, before he got hold of the axe. *It had been used as a sledge hammer, driving something before he got hold of the axe.* Could have been used to drive something with it and knocked the notches in it.

[fol. 295] Q. Do you know where he got the axe?

A. No sir.

Q. Do you remember the night the house burned?

A. Yes sir.

Q. Where you at home that night?

A. Yes.

Q. Do you know where Ed Spears lived?

A. Yes.

Q. Where did he live at that time?

A. In the next house east.

Q. Did anybody else live in that pasture?

A. No sir.

Q. Just two families?

A. Yes.

Q. Do you know whether Ed Spears was at home that night?

A. Nothing but what he told me.

Q. When was your attention first called to the fire?

A. My oldest boy, after we had gone to bed.

Q. Do you know what time it was?

A. A few minutes after eight.

Q. Was the house on fire at that time?

A. It had done fell in.

Q. It had done fell in?

A. Yes.

Q. Was the place where Elmer Rogers lived in Choctaw County, Oklahoma?

A. Yes sir.

Q. State of Oklahoma?

A. Yes sir.

Q. At that time?

A. Yes sir.

[fol. 296]. Cross-examination.

By Mr. Belden:

Q. How long before the burning of the Rogers house was it that you last saw the axe, if this is the axe?

A. It was hardly a month.

Q. About a month before when you saw the axe?

A. Yes sir.

Q. And you mean to tell that jury that having seen an axe a month before, now more than a year, you can still tell it is the same axe?

A. Yes sir.

Q. Why?

A. I noticed his axe. I paid close attention to his axe when he was chopping wood. He called my attention to his axe.

Q. In what particular?

A. He says, "What do you think of my axe?" I says, "Well, I guess it is all right." And he said, "It is the best I can do right now." He thought he could make out with it until he could do better.

Q. In what particular did he call your attention to it? That is was not sharp, or what?

A. Really particularly what he called my attention to, he was chopping wood and asked me if I had a better axe, and I said not much. He said, "This is one I picked up." I taken the axe and handled it in my hand. He lived north of me. I turned it over and looked at both sides of it. That is why I can identify that axe.

Q. And from that one observation you still can identify the axe?

A. Yes, him and I were working together for about a month over there. I waited not less than a dozen times, go through his yard and see him chopping wood for his wife to cook with, and come back in the evening. I would stop, and he would come to my house and get water.

Q. Is this axe in the same condition as it was in when [fol. 297] you last saw it about being dull or not?

A. He had been using the axe since then.

Q. How do you know.

A. He moved from where he was to the other house.

Q. When he moved a mile away, how do you know he had been using it?

A. I saw him going through the pasture with it on his shoulder.

Q. And was using an axe in this condition clearing?

A. He was not clearing.

Q. What was he doing?

A. Cutting wood for himself.

By Mr. Horton:

Q. You say he was cutting wood for himself?

A. Yes sir.

Q. Did he say something about having found that axe in a brush pile?

A. Didn't say where he got it. He said he just picked it up?

Witness Excused.

ROY HARMON, in behalf of the State of Oklahoma in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q. What is your name?

A. Roy Harmon.

Q. At this time we want to offer the axe in evidence as having been sufficiently identified.

By Mr. Belden: We enter the same objection as heretofore made in the record.

By the Court: Overruled, exception allowed. It may be admitted.

[fol. 298] Q. You are the same witness who testified here yesterday in this case?

A. Yes.

Q. What position did you hold in the month of January, 1940?

A. I was sheriff of this county.

Q. Do you remember when the Rogers murder occurred?

A. It was on the 31st of December, 1939.

Q. Do you remember when these shells were found down there?

A. I sure do.

Q. And after those shells were found did you take this gun and shoot some other shells in it?

A. I did.

Q. Who was with you when you did that?

A. Mr. Cheatwood.

Q. How many shells did you shoot?

A. I shot one and he shot the other one.

Q. And he shot the other one?

A. Yes.

Q. Do you know what happened to those shells?

A. Yes. I brought them to town.

Q. What did you do with them?

A. I turned them over to Mr. Cheatwood, and he turned them over to the ballistic expert.

Q. What did you do before you turned them over to Mr. Cheatwood?

A. I wrote my name on them.

Q. Could you identify them if you saw them again?

A. I think so by my name being on them.

Q. State's Exhibits Thirteen and Fourteen. Can you identify those two shells?

A. I think so. There is one with my name, Roy. That [fol. 299] is one of shells that was shot. This is the other one.

Q. Were those shells shot for the purpose of making a comparison with shells that had been found?

A. That is right.

Q. In the pasture over there?

A. That is right.

Q. Are these two shells in the same condition they were in when you shot them and marked them?

A. They are.

Q. Could you identify the shells found in the pasture over there?

A. Yes.

Q. How can you identify them?

A. When those shells were found over there they brought them in and handed them to me.

Q. What did you do with them?

A. I turned them over to Mr. Cheatwood, and he turned them over to the ballistic expert, Mr. Crabbe. He had his initials on them, and if I am not mistaken V C.

By Mr. Marshall: For the sake of keeping the record straight, I think the question was asked whether or not these were the shells found in the pasture, and it is quite obvious that the sheriff is not in position to say what was found in the pasture. If the question is asked were they the shells that were given to him, we have no objection, but the question was, were they the shells that were found in the pasture.

By the Court: That part may be stricken.

Q. Did you see Mr. Cheatwood mark those two shells?

A. No, I didn't see him mark them, but they handed me those shells, and said, "Those are the shells we found."

Q. How are they marked?

[fol. 300] A. V. C.

Q. Both of them?

A. Yes.

Q. Are they in the same condition as they were the last time you saw them?

A. Looks like they are.

Cross-examination.

By Mr. Marshall:

Q. The night W. D. Lyons was arrested, was he brought into your presence?

A. No, I came into his presence.

Q. What night was that? Do you remember?

A. No, I don't.

Q. How many days after the burning of the Rogers home was it, if you remember?

A. I could not say.

Q. You were working on the case all the time?

A. Sure.

Q. But do you remember when he was brought to your office, or rather when you came into the office and he was there?

A. I think it was the 23rd of January. I am not sure.

Q. Do you want to think over that?

A. I said I didn't remember the exact date. I don't remember the exact date. I did not write it down.

Q. Did there come a time after that that Lyons was questioned in the prosecuting attorney's office? Was Lyons ever questioned in the county attorney's office in your presence?

A. Yes. I think I told you that yesterday, didn't I?

Q. This is entirely a different matter. The question is whether or not Lyons was questioned in the county prosecutor's office in your presence.

A. He was. That is the night he admitted it.

By Mr. Marshall: If your Honor, please, may we have the voluntary statement at the end of the answer stricken; that was the night he admitted something?

By the Court: It may be stricken.

Q. In relation to the time you were given these shells, how close was that to the night he was questioned in the county attorney's office?

A. When he was questioned in the county attorney's office?

Q. Yes sir.

A. That was about eight o'clock in the next morning.

Q. And he was questioned in the county prosecutor's office the previous night and in the morning?

A. In the morning? No.

Q. The night before did not go past midnight that you questioned him?

A. Well, I think it was around two o'clock he admitted it, told where the shells were, and then the axe.

Q. Around two o'clock?

A. Yes.

Q. And on the same morning, is that the morning you were given the shells?

A. Yes, when they went out there after them.

Q. Did there come a time after that that he was brought back to you, the same day that he was taken to the Rogers home?

A. Yes, they brought him back to jail.

Q. On the same day didn't you give instructions to have him taken to Antlers?

A. Yes, he went to Antlers.

Q. And on the same day, didn't you instruct Mr. Raulston [fol. 302] to take him from Antlers to McAlester?

A. I sent Van Raulston and Roy Marshall to take him to McAlester.

Q. That same day? Rather that night.

A. Yes.

Q. The same day of the week? Are you positive about that?

A. Yes.

Q. Now, the other questions I want to ask you are these: How much of the time were you in the office during the time that Lyons was being questioned on that same night?

A. That would be hard for me to answer. I was out on other things.

Q. Did you see someone set a pan of bones in his lap?

A. I came in and got the bones myself, I think. I got them or sent for them.

Q. You sent for them or got them?

A. I wouldn't say which I did. If I didn't, I sent.

Q. Who put the bones in the pan?

A. They were picked up by all of us. I put the lady's teeth in there with them.

Q. And the Lady's teeth were in there?

A. Yes.

Q. Was this after they had been buried? The bodies? The funeral?

A. It was before.

Q. And you took the teeth and bones——

A. —her jaw teeth.

Q. And bones, the other bones——

A. I did not have anything to do with the other bones. The teeth were the ones I put in the pan.

Q. Were other bones in the pan?

A. Yes.

[fol. 303] Q. Do you know whether they were taken from out there and put in a pan and put on Lyons' lap?

A. Set in his lap.

Q. Who put them there?

A. I couldn't say.

Q. All right. When they were put there, what was said?

A. I don't remember just exactly.

Q. Just the best of your recollection.

A. I know when they were put in his lap I said, "There is a little baby you burned up," something like that. I don't remember what the others said.

Q. Did you ask him to answer the question?

A. Yes.

Q. Then what did he say?

A. He didn't say anything. Kind of quivered.

Q. Did he quiver?

A. You could tell his lips worked a little.

Q. His lips were quivering?

A. Yes.

Q. And you didn't ask him if he hadn't better talk or anything like that?

A. I don't remember.

Q. During the time you were in there did you see anyone strike Lyons with anything at all?

A. I did not.

Q. Did you see Mr. Cheatwood's hands while he was questioning him?

A. I wasn't paying any attention to Mr. Cheatwood.

Q. You would not say whether or not he had any weapon at all — his hands?

A. If he had anything in his hands I did not see it while I was there.

[fol. 304] Q. How many people were questioning him?

A. Well, there was not over one at a time when I was in there.

Q. Did you question him?

A. A very little.

Q. But you did question him?

A. Like I said about the pan.

Q. You did question him then?

A. That is all I said about the pan.

Q. Did you hear the county attorney question him?

A. I heard him talking to him.

Q. Did you hear the assistant county attorney questioning him?

A. I heard it, yes.

Q. Did you hear Mr. — Question him?

A. Some, yes.

Q. Did you hear any of your deputies question him?

A. They didn't.

Q. Did you hear the state patrolmen question him?

A. I didn't, no.

Q. Those that questioned him, did they question him in an ordinary tone of voice, like I am now?

A. Something like it.

Q. Nobody was yelling, is that correct?

A. Yes.

Q. Nobody threatened him, is that right?

A. I never heard it.

Q. Did you hear anybody curse him?

A. Did I hear anyone curse him?

Q. Did you curse him?

A. I don't do that.

Q. Did you hear anyone do it?

A. Not in my presence.

[fol. 305] Q. If they had you would have heard them in your presence wouldn't you?

A. More than likely I would have.

Q. During the whole time, from the time that Lyons was arrested, until this night, did you see any mistreatment of him?

A. I sure did not.

Q. You were the one who carried him to jail that night?

A. He followed me.

Q. Did you bring him back when Van Bizzell was questioned?

A. I don't remember whether I went or not.

Q. Was he brought back?

A. Yes.

Q. You don't remember the time he was taken up do you?

A. It was after midnight. I think I told you it was around two o'clock, may be a little later or earlier. That I don't know for sure.

Q. How much later was it that he was brought back to when Van Bizzell was brought?

A. Just as quick as we could go and get him.

Q. About how long was that?

A. I don't know whether it was an hour or not.

Q. Was it less than an hour?

A. I judge it was around that.

Q. That would be about three o'clock?

A. Yes.

Q. About how long was he questioned then?

A. Not very long, until he identified the other man.

Q. About how long?

A. Could have been 20 or 30 minutes, could have been longer.

Q. Then what happened?

A. Then at six o'clock I went back and got him.

[fol. 306] Q. We left with the questioning. What happened then? Was he taken back to jail?

A. Yes.

Q. Some time after 3:30 he was taken to the jail?

A. It was somewhere between 2:30 and 3:30.

Q. What time was he taken to the home, right after dawn?

A. I had been up all night. I called my undersheriff at six o'clock. I looked at my watch. I said it was time for any one to get up.

Q. From the time you got up to take him, was he given any other time to sleep or rest that day?

A. I imagine he was asleep all day until we got ready to take him off.

Q. What time did he get back from the home out there?

A. The house that was burned out there—I left and went to breakfast. When I came back it wasn't long, I don't think, until they were back.

Q. Can you estimate it?

A. Well it is more guess work. I judge it would be anywhere from eight to nine o'clock.

Q. Was he immediately put back in jail?

A. He was.

Q. Was he taken out that morning before he was taken to Antlers?

A. If he was I didn't know it.

Q. Didn't you have him taken out to have a picture taken?

A. That was before they went to Antlers, I think. I am not sure.

Q. Was it immediately before?

A. I think so. I am not sure.

Q. You don't know how much time he had in the cell by himself?

A. No, I don't.

Q. During this whole time did he have a lawyer representing him?

[fol. 307] A. I couldn't say.

Q. Did anyone ask him that in your presence?

A. Not in my presence.

Q. Getting back to the bones, who put them in his lap?

A. I think I did.

Q. Why?

A. To refresh his memory of what a bad deed he committed.

Q. You did not put them there to frighten him did you?

A. I don't think that it would frighten him. Just to show him what he had done.

Q. Did you expect that he would make a confession after he saw them?

A. I figured that it would refresh his memory and make him think.

Q. Did you think that would make him confess?

A. Put him to thinking. I know it would in my lap if I had committed the crime.

Q. Were you there to get a confession that night? Was it the purpose for questioning in the county attorney's office?

A. We had him in there talking to him trying to clear that murder up.

Q. Was it the purpose of getting a confession from him?

A. Trying to.

Q. Did you call other people—Mr. Reason Cain, to come in?

A. No.

Q. Did you call the State patrolmen?

A. I didn't.

Q. Did you instruct anyone to call anyone?

A. I don't remember.

Q. But you were there for the purpose of getting a confession?

A. Trying to find out, yes.

[fol. 308] Q. After those questions, does that refresh your memory as to why you put the bones in his lap?

A. I just got through telling that.

Q. Was it or was it not to get a confession?

A. To refresh his memory of that awful crime he had committed.

Q. That who had committed?

A. I knew if he did, he would admit it.

Q. You mean the bones would help him admit it?

A. It would to me if I had committed it.

Q. And that is the reason they were put in his lap?

A. To show him what he had done.

Q. And that would make you admit something?

A. More than likely if I had committed a crime.

Q. Is that the reason you put them in his lap?

A. I am not saying.

Q. You are not saying.

Witness excused.

VERNON CHEATWOOD, in behalf of the State of Oklahoma in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Horton:

Q: State your name.

A. Vernon Cheatwood.

Q. What position do you hold?

A. I am special investigator out of the Governor's office.

Q. Did you come to Choctaw County in January, 1940?

A. Yes.

Q. About when did you come?

A. As I recall, about the 2nd of January, or the 3rd.

[fol. 309] Q. Why did you come?

A. I was asked to come down by the Governor of the State of Oklahoma.

Q. Did you go to the scene of the crime?

A. Yes.

Q. Did you, during the following days, make an investigation to uncover evidence of the crime?

A. I did.

Q. Did you go to the scene of the crime after the defendant, W. D. Lyons had been arrested?

A. Yes.

Q. Did you go down there at a time when he was present there?

A. Yes.

Q. Were you present when they found the axe down there?

A. Yes, I went with him that morning.

Q. Could you identify that axe if you saw it again?

A. Yes.

Q. Is this the axe?

A. Yes, that is the same axe we found that morning.

Q. How can you identify it?

A. We took this axe, it had been burned. When we picked it up I was very much interested. I thought being through the fire, we might be able to see if there were any blood stains on it. I noticed each side was pitted, and one side had been ground down, and it looked like there had been a terrible gap or something in the other.

Q. What gap is that?

A. This gap here.

Q. Was that gap in the axe when you found it?

A. Yes.

Q. Is that axe in the same condition that it was when you found it?

A. Yes.

[fol. 310] Q. Did you find any shells around the house?

A. No, not around the house.

Q. Did you find any in the pasture?

A. I found some on a fence row. I didn't, but W. D. did. I didn't find anything.

Q. How far from the house were those shells found?

A. I would say approximately half a mile.

Q. Which direction?

A. South and east of the house.

Q. I hand you State's Exhibits Eleven and Twelve and ask you what those are.

A. Those are the shells that were picked up by W. D. Lyons and given to us that morning while we were there.

Q. How do you know it?

A. They were mashed up, crushed, like that, when he picked them up himself and handed them to Mr. Brown, and Mr. Brown handed them to me. I taken a pen and marked my initials on them, each shell has my initials.

Q. Are those shells in the same condition that they were in when you found them that day?

A. Yes.

Q. Did you later then fire any shells from this gun?

A. Yes, I went with the sheriff, Roy Harmon, to Mr. Taylor's house, south of town, to a filling station, and he and I fired the shells.

Q. How many test shells did you fire?

A. Two as I recall.

Q. I hand you State's Exhibits Thirteen and Fourteen and ask you what those are, if you know?

A. These are the shells that we used. Those are the shells. Roy Harmon wrote his own name on them himself.

[fol. 311] Q. Are those in the same condition that they were in from the time they were fired until the present time?

A. Yes.

Cross-examination.

By Mr. Marshall:

Q. Mr. Cheatwood, how long have you been a special investigator?

A. I have been working in this administration ever since he was in office. I started under the Murray administration.

Q. How many years, approximately?

A. Six or seven years.

Q. Do you handle mostly criminal cases?

A. Yes, criminal or civil, whatever comes up.

Q. Can you give me a rough estimate of the number of confessions you have obtained in that position?

A. No, I couldn't.

By Mr. Horton: We object as incompetent, irrelevant and immaterial.

By Mr. Marshall: It is very material.

By Mr. Horton: You might ask him how many confessions he obtained in this case.

By Mr. Marshall: We think we are entitled to know the course of conduct of a witness. I want to show his reputation.

By the Court: I will permit you to answer the question.

Q. You can give us an estimate of how many?

A. How would that be pertaining to this?

Q. How many confessions of any type have you secured during your investigations?

A. I wouldn't know off-hand how many. I have been on several cases.

Q. You could not estimate how many?

A. No.

[fol. 312] Q. Several?

A. I wouldn't say I got confessions but they were tried and sentenced.

Q. No, I mean the cases that you were on investigating or helping to investigate. Can you give us a rough estimate of how many written confessions you obtained prior to this trial?

A. No, I don't know, off hand, how many.

Q. You have gotten several?

A. Yes. I have been on several cases. I wouldn't say I was the one that got the confession, other officers were in. I was working with them.

Q. Several other cases on which you worked with other officers confessions were obtained?

A. Yes.

Q. Do you have what you call a "negro beater?"

A. No.

Q. Do you have a blackjack?

A. No.

Q. Have you ever carried a blackjack?

A. Never.

Q. Have you ever had a blackjack in your hand?

A. I probably had one in my hand, but never carried one.

Q. Have you ever had anything that would be a piece of leather, or piece of leather?

A. No.

Q. Have you ever had anything several inches wide and long leather with something inside that rattled?

A. No sir.

Q. When you were sent down by the Governor, were you sent down before or after several convicts at the prison camp were arrested for the crime?

[fol. 313] A. If I recall correctly, there had been only one at the time I came down here.

Q. But one had been arrested?

A. I won't say for sure whether there had been one or more, but I believe I am correct. I think one had been accused through a note, or something, from the sub-prison. I don't — any was in jail when I came.

Q. At the time you came was there or was there not a condemnation of the system of the camp in the area as the result of what happened, and the men in charge of this camp?

A. What do you mean, the prison camp here?

Q. Yes.

A. No, I have not seen any publicity of it.

Q. Did you know anything about the case?

A. No.

Q. You were sent here to investigate the murder of Mr. and Mrs. Rogers?

A. That is right.

Q. And after you came down on your investigation, did there come a time when several inmates were arrested from that prison farm?

A. Yes, a few but not several.

Q. Then what happened?

A. They were all exonerated from the crime.

Q. What do you mean by exonerated?

A. It was shown that they were not connected, and we were doing like all other good citizens and officers, trying to serve the people and find who committed the crime.

Q. There come a time when W. D. Lyons was arrested?

A. Yes, he was.

Q. Did you order his arrest?

A. No.

[fol. 314] Q. Did you know about his arrest prior to that time when he was under such arrest?

A. Yes, we had known. I got here late that day and he was arrested that night.

Q. When he was brought in did you see him?

A. Yes.

Q. Where did you see him?

A. He was downstairs in the sheriff's office.

Q. How many men were present?

A. I don't know. There were several. I had been to the bottoms checking up on another lead and came in and he was there.

Q. Do you have any idea how many were there?

A. I don't have any way, no.

Q. Did you see anyone strike him?

A. I did not.

Q. What did they do?

A. They were fixing to take him to jail.

Q. Did you see a bruise on his forehead?

A. I did not.

Q. Did he have a black eye?

A. No.

Q. Did he look like anything had been done to him?

A. No.

Q. Did there come a time when he was questioned in the county attorney's office?

A. Yes, I questioned him myself.

Q. Who else?

A. I think the county attorney and I don't recall anyone else.

Q. Did the sheriff?

A. He talked to him later in the night, but I don't think he did any questioning. The county attorney came late. He was sick.

[fol. 315] By Mr. Marshall: Now, may we have that stricken? I am trying to keep the record straight from voluntary statements.

By the Court: That may be stricken as a voluntary statement.

Q. Did you do quite a bit of questioning?

A. Yes.

Q. Where were you sitting?

A. I was sitting—that is the desk in the county attorney's office. He was sitting in front of me, and I was at the end of this desk. I had him in front of me.

Q. For the purpose of the record can you give us how far it was.

A. He was right here. He was in front of me looking me in the eye.

Q. Not more than six inches apart?

A. We were right close to where I sat in a chair and talked to him.

Q. It wasn't over six inches was it?

A. I didn't measure it. I wouldn't have any way of knowing, but he was right in front of me.

Q. Was it more than a foot?

A. I answered that I didn't measure it.

Q. Your best recollection?

A. The best I can say is that he was placed right in front of me.

Q. Your motions with your hands do not appear in the record. The only thing is what you say that appear in the record. I am trying to get you to say, when you do this with your hands, how many inches would they be apart?

A. I could be confident of seven or eight inches between our feet. I would not be specific.

Q. During that time did you tap him on his knees?

A. No.

[fol. 316] Q. Didn't touch him?

A. I taken hold of his knees with my hands. You know two or three times he sulked, didn't want to talk. I tried to get him to talk, to look at me. He acted like he wanted to go to sleep. I jerked him but never hit him.

Q. You jerked him?

A. Take his trousers and make him look at me.

Q. Why did you want him to do that?

A. My experience has been when you are on a case like this you have to keep that man on the scene of that crime or he will get away from you.

Q. And that is what you were doing?

A. Yes. I wanted him to keep looking at me, talk to me, or he might have gone to Texas from me.

Q. Why did you want him to keep looking you in the eye?

A. I wanted to see how long it would be.

Q. You wanted to get a confession, didn't you?

A. I did not want a confession out of him any more than anyone else. I wanted to find out who committed it.

Q. Did you want a confession out of Lyons?

A. Well, if he had not been guilty, I didn't. My idea is that unless you keep him keyed up at the scene of the crime

he gets away. I don't know just how to explain the situation in that kind of a case but you at least have to keep them to where you can look at them in the eye while you are talking to them.

Q. Don't you have to be firm with them?

A. You have to talk to them.

Q. And be firm with them?

A. That is right.

Q. And you talk in the regular conversation or not?

[fol. 317] A. At times you have to use your own judgment. You could not get a man to talk that had committed murder by calling him son but use your judgment.

Q. You used your own judgment on Lyons?

A. Yes.

Q. What did you do?

A. I questioned him.

Q. Just like you and I are talking?

A. I was talking but I was talking to him about the murder.

Q. And you were firm?

A. I was firm.

Q. Did you tell him he had better talk?

A. No, I just asked him the question, to talk.

Q. Did you tell him he had better talk?

A. No.

Q. Did you slap him?

A. No.

Q. Poke him in any way?

A. No.

Q. Did you set a pan of bones on his lap?

A. Yes.

Q. Why?

A. That was for the purpose of refreshing his memory of that gruesome crime that had been committed.

Q. What did you expect to get from that?

A. With my experience I wanted to bring him back into the crime and refresh his memory of the whole situation, and I did that.

Q. What did you expect to get from that?

A. That I would find out one way or another whether he had done this crime or whether he had not.

Q. You didn't expect a confession of what some other had done?

[fol. 318] A. I didn't say that, but I expected emotion from the witness.

Q. Did you want to frighten him?

A. No, I didn't want to frighten him.

Q. Has it been your experience that something like that done when a man is questioned would frighten him?

A. I will answer this way: I was never on this kind of a case where so many were involved.

Q. And your experience has been you said was to use your own judgment?

A. Yes.

Q. What I want to know is whether or not you did not know from your experience that something like that would frighten a man.

A. I did not have the intention of frightening him but to refresh his memory to where he would tell me.

Q. Didn't he quiver?

A. No, he was as cool as a cucumber.

Q. Didn't there come a time when he did quiver?

A. There was a time when he went to talking. But he would not talk, he acted like it might have been a joke.

Q. Didn't you see some sign of fright?

A. I couldn't answer. I have not seen many people frightened to the extent of being nervous.

Q. He never became nervous or frightened?

A. He refused to say anything. He sat and joked us.

Q. Did he make you angry?

A. But I went ahead and continued to question him.

Q. Did you curse him?

A. I don't remember cursing him.

Q. But are you sure that you did or did not?

A. No.

[fol. 319] Q. That is your best recollection?

A. Might have said a word or something, I don't remember cursing the man.

Q. Did you hear anybody else?

A. No.

Q. About how large a room is that?

A. I don't know, about ten by twelve, something, and a door going into another little office.

Q. What was the largest number of men in there at one time to the best of your recollection?

A. May be six or seven, may be not. I wouldn't have any way of knowing.

Q. Did you see anybody strike him?

A. I did not.

Q. Were you there the whole time?

A. I was not.

Q. Did you see him brought in?

A. I believe I asked to have him brought to the county attorney's office.

Q. For what purpose?

A. I wanted to talk to him about this crime.

Q. But why did you request others to come?

A. Every man that worked on the case, were all interested, he worked day and night trying to find the man who committed it. I didn't ask them, they came and went as they wanted to.

Q. Has it been your experience that the more people you have in a room the easier it is to get a man to talk?

A. No, that is not necessary, but it has been my experience that officers on a case expect to be present when you are questioning him.

Q. A practice?

[fol. 320] A. Yes.

Q. You could have questioned him by yourself?

A. That is right.

Q. Why didn't you?

A. I did not have the authority to tell the officials to stay out. They had a right to be there, and had been on the case.

Q. During the whole time has there been a time they talked alone? To refresh your memory at the time of the preliminary hearing, didn't you talk to him at McAlester?

A. I never did talk to him at McAlester. Two officers came with me but they brought him down here.

Q. Did you talk to him?

A. All of us, on the way down here, but there wasn't much said to him.

Q. You have never talked to him alone as you remember?

A. I have never talked to him alone.

Q. What I want to get, in this particular room why there would be men coming in and out, six or seven men. I am still trying to get that straight.

A. The only thing I can tell you is that they were interested. A lot of them stayed nearly all the time. I don't remember. They would leave and come back in.

Q. Did you, at any time after that confession, to a hotel in this town, in the presence of witnesses there tell a man to go up stairs and get your negro-beater?

A. No sir, I did not.

Q. Have you told anybody in this county that you beat that confession out of him and that you beat him all over every part of the body?

A. No sir, I did not.

Q. And if you had had that weapon before you would have [fol. 321] got it out of him before?

A. No.

Q. You deny saying that to anyone?

A. No, I didn't make that statement.

Q. Did you make a statement similar to that?

A. No.

Q. Did you or did you not show to somebody in this county a blackjack while you were here in this county?

A. No sir.

Q. In fact you didn't have a blackjack?

A. That is right, and I don't have one now.

Q. Let me get this straight. Did you see him at McAlester before this preliminary hearing?

A. You mean before they set his preliminary hearing? No sir, I did not.

Q. You saw him at McAlester one time?

A. Yes, and there was a whole lot of officers that brought him down and my car was there, and two officers came with him.

Q. Did you, during that time, tell Lyons if he didn't plead guilty what would happen to him?

A. No.

Q. During that time did you know that Lyons did not have counsel?

A. At the time of the preliminary hearing?

Q. I mean prior to that time? From the time he was arrested until the preliminary hearing?

A. I didn't know about that. All I know about counsel is when he came here. I knew there had not been anybody up there representing him.

Q. Did you ask him if he had a lawyer?

A. I don't remember asking him if he had a lawyer.

Q. Did you ever ask him if he was willing to be questioned [fol. 322] by you?

A. I told him anything he said, he had his Constitutional right. He did not have to talk unless he wanted to.

Q. You told him that?

A. I told him that in the county attorney's office.

Q. Before the questions were asked?

A. Before he talked. He sullen and wouldn't talk. I made that statement.

Q. That was after some questioning had been going on?

A. I think I made it before the questioning had been going on.

Q. A minute ago you said there had been some and he was sullen.

A. Might not have been, but I remember making that statement to him myself.

Q. You deny striking this man at any time?

A. That is right.

Q. But admit yanking his legs around?

A. Yes.

Q. And admit putting the pan of bones in his lap?

A. Yes.

Q. Whose bones were they?

A. They were a part of the bones remaining of the four year old kid that was burned alive, arms and legs of Mr. and Mrs. Rogers in a pan. I asked for them to be brought up and placed them in his lap myself.

Q. And told him what they were?

A. No, I don't know that I told him but I asked him to pick them up and tell me.

Q. Did he pick them up?

A. He did.

Q. At your suggestion?

[fol. 323] A. Yes.

Q. He didn't tremble?

A. No, he picked up the woman's teeth. I asked him what they were and he said teeth that were cut out of Mrs. Rogers' head. He reached in the pan and said that.

Q. You are positive about that?

A. That is what he told me.

Q. And after that is when the confession was procured?

A. Some time later he opened up. He first made a statement. He didn't want to tell me. He said he would talk to the county attorney. The county attorney come in and the sheriff, then we all came in.

Q. Did you hear the county attorney tell anybody to stop beating him?

A. No.

Q. After the questioning, after the pan of bones, after your yanking his legs, was it then that he made this confession?

A. You mean which confession? In here?

Q. That is right.

A. Yes. He later talked to the county attorney and the sheriff, then all of us.

Q. What time was that?

A. It might have been one o'clock. It might have been one thirty, somewhere. I don't remember the time.

Q. Then what happened?

A. He was placed back in jail. They went out and arrested another man he accused. We went and had coffee.

Q. Did you send coffee to him?

A. I wouldn't say. I went and drank some coffee and came back. He went ahead in the presence of the witnesses and told the whole story and about daylight we went out there.

[fol. 324] Q. How close was it between the time he talked in the presence of you and the other men until he went to Mr. Rogers' home?

A. Probably an hour.

Q. And he was brought back?

A. After he went with us?

Q. Yes.

A. Yes.

Q. What time was that?

A. We went about day light. We wasn't there very long, just a few minutes going over this stuff and dodged back to town and he was placed in jail.

Q. How long did he stay there?

A. I don't remember. I left that afternoon and went to Oklahoma City. Someone told me he was carried to the penitentiary.

Q. Don't you remember that he was taken out of jail and you had your picture taken with him?

A. Yes, but that was in the afternoon, after we had gone out and come back, just before I left.

Q. Can you give us any idea when that was?

A. Some time in the afternoon.

Q. You don't know anything more until the preliminary hearing?

A. Well I came to McAlester and he and two officers rode with me in my car.

Q. How many days were you present in this court room during this trial?

A. I was in here the first day and a part of the second day, then the Judge told me I would not be excused and when he asked me, I left the court room.

Q. During the larger part of yesterday weren't you in the room on the left of the Judge's bench?

A. You mean here?

[fol. 325] Q. No, the room with "County Commissioners" on it.

A. I have been in there several times, have been in there several times today, but I was not at this door nor any other door.

Q. Have you read a transcript of your testimony from the preliminary hearing?

A. No.

Q. Didn't you yesterday when three of us were standing at the corner, sit down here during a recess and read that transcript?

A. I didn't read my transcript. I didn't read the witness that had testified.

Q. It was a transcript of the preliminary hearing?

A. I don't know whether it was or not. There was something on top and I was looking at that. I have not read mine.

Q. But you were reading?

A. It was open and I was reading. I didn't turn a thing.

Q. Were you in the warden's office the morning of the preliminary hearing?

A. I don't remember being there. I think they brought W. D. Lyons out and I was in the hallway and wasn't in the warden's office.

Q. Do you remember talking to Lyons in the warden's office?

A. No sir, I never talked to him in the warden's office.

Q. Do you deny that you talked to W. D. Lyons in the warden's office and told him what would happen, there in the warden's office, if he did not plead guilty on the morning of the preliminary hearing?

A. No, I did not.

Q. You did not touch him that day?

A. No.

Re-direct examination.

By Mr. Horton:

Q. You weren't present in the warden's office when the defendant made a statement up there to Jess Dunn?

[fols. 326-332] A. No, I was not.

Q. These test shells that you identified, what did you do with them?

A. I brought them in and turned them over to you. Later they were turned over to Mr. Crabbe by me.

Q. Did you get them from me, the same shells, and give them to Mr. Crabbe?

A. Yes.

Q. How about these shells?

A. I did the same thing with those.

Q. They were turned over to Mr. Crabbe by you?

A. By me.

Q. There has been some interrogation about your reputation as an investigator. Do you remember the Roger Cunningham case?

A. Yes.

Q. That was a case in which a man had killed his wife in Oklahoma County, wasn't it?

By Mr. Marshall: If your Honor, please, we never went into details about any other case, and he is going into another killing by name. It is not proper cross-examination. The only thing I asked about was how many confessions. I think this question about the investigation of any other case is completely incompetent, irrelevant and immaterial at this time.

By Mr. Horton: I am asking the same right that he had to ask about some other investigation.

By the Court: Do you think either is proper?

By Mr. Horton: No, sir. I do not.

By the Court: Do you think two wrongs make a right? If not, let's leave it off there.

Witness excused.

[fol. 333] By Mr. Horton: The State rests.

[fol. 334] By Mr. Marshall: If your Honor please, for the purpose of the record, before the State rests, may we renew our objection and move that the entire testimony of the preceding witness be stricken for the reason and on the ground that the two shells used for comparison were the two shells obtained by force and as the result of that fact. We made our objection before and move that the entire statement be stricken from the record.

By the Court: The motion is overruled and exception allowed.

Thereupon: Court takes recess until nine o'clock tomorrow morning, the jury having been placed in charge of sworn bailiffs of the Court. And thereafter, to-wit: At nine o'clock a. m., on January 30, 1941, the jury being present, and the defendant being present in person and by his attorneys, proceedings are resumed in the trial of this case, as follows, to-wit:

By Mr. Belden: At this time, does the record show that the State has rested?

By the Reporter: It does.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

By Mr. Belden: Comes now the defendant and asks the Court for an instructed verdict on the evidence introduced by the State, the same being insufficient to support the complaint, information, and charges filed.

By the Court: Overruled. Exception allowed.

By Mr. Belden: And the defendant at this time desires to make his statement which he reserved.

By the Court: You may proceed.

DEFENDANT'S OPENING STATEMENT

By Mr. Belden: May it please the Court and Gentlemen of the Jury: In this case the defendant believes the facts to be as I am going to relate to you now. That when this de- [fol. 335] defendant, W. D. Lyons, was arrested, that no warrant had been issued for his arrest, that some officers, or someone in a car, went down to where he was living, that he was not in the house, but had gone over across the tracks where there were some woods, where he chopped wood, and that he had gone over there on that occasion because he had a little whiskey there. As he was coming

back, this colored boy who testified yesterday, I can't recall his name, said there was a car down there, and some men, and Lyons said, "Go down and see who they are and come back and tell me." Lyons came to the house and was arrested, and that two officers walked with him from the house over to the jail, and on the way over one of them—I am ahead of the story. That they arrested him, took his belt off, took his hands behind, tied his hands behind him. As they walked over with him, one of the officers picked up a board and struck him over the head, over the right eye, with that board. That they beat him with their fists on the way. That they went by the jail, west of the jail, and bumped his head against a tree a number of times, and they brought him to the jail and took him up stairs, and there an officer hit him in the mouth with the keys, the jail keys. He was knocked down at that place. Later he was taken from the jail into the sheriff's office, and then into a side room off from the sheriff's office and was beaten by a number of officers. I don't remember the names of the officers who beat him in the side room off the sheriff's office, but the defendant can tell you who they were. That after they beat him for a time, the sheriff stopped them from beating him any longer. The sheriff himself did not participate in that beating, or any other beating. He left it to the other deputy sheriffs and others. And that later this defendant was taken one night to the county attorney's and there, somewhere around seven or eight o'clock they [fol. 336] began to question him. That they had him seated in a chair, that the county attorney was on one side of him, and that Mr. Cheatwood, the Governor's special investigator, was sitting in a chair immediately in front of him, right up against him, that the various officers, one officer, Reasor Cain, stood behind him, and that the highway patrolman, Mr. Hawkins and various officers surrounded him to the back, and that as the county attorney would ask a question and if he did not answer the question that Mr. Cheatwood had a blackjack, and would beat this defendant on his legs, or his arms, or about his body. That Cheatwood himself questioned him, would ask him a question and if he didn't answer to suit, that the beating would begin again. That during that beating they had him get up and bend over a table and they beat him on the back. I will correct that, it was a desk. And that the officer Cain stood at his back

hitting him with his fist in the back of the neck and various places. That they continued to question him from early that evening, hour after hour, taking turns about without letting up, until sometime along between two and three o'clock next morning. After hours of beating the question was again asked him, while sitting in that chair, surrounded by officers, "You killed Elmer Rogers, didn't you?" and the defendant said no. And they said, "You God Damned black son-of-a-bitch, you did," and they continued to beat him until finally this defendant, in order to stop torture and punishment finally said yes. That they then would ask him another question, and they would continue to beat him all this time with that blackjack and with their fists until such time as he would answer and give their desired answer, and that is the nature and kind of a confession that was obtained from this defendant. That some time around four o'clock that morning, this defendant was taken back to the jail for a few minutes, and was taken back to the county attorney's office after they had arrested [fol. 337] a man by the name of Van Bizzell, and was re-questioned, and that some time after daylight they took him to Fort Towson, or over to the Rogers home, where it had been, and that there two officers left this defendant over by a fire and they went over together and claimed that they had found an axe down there in the ground in a hole that they dug. That this defendant took them about a half or three quarters of a mile south of where the Rogers house had been, and told them that he had been hunting there on the morning before the burning of the Rogers home, and that he had shot twice at a rabbit, and that he extracted the shells, and that during the time they were beating him they asked him where the shells were. He said that the only shells that he knew anything about was the two he had used that morning when he was hunting rabbits and had shot a rabbit. They asked him where those two shells were, and the facts were there was a rabbit he shot at, sitting, and he shot and missed him and he run and he shot again, and those two shells were found together, and not crushed, but they were found a few feet apart where he shot at the rabbit. That this defendant was brought back from that scene out there, placed in the jail somewhere around nine or ten o'clock that morning, and that after that he was taken to Antlers, Oklahoma, and

placed in jail, and that same afternoon Van Raulston and a barber by the name of Marshall took him to the State penitentiary, and that on the way over there that Van Raulston, the officer, threatened him many times. Yesterday I asked Mr. Marshall what they talked about on the way. He said—that you remember. I said, “What did you talk about?” and you gentlemen remember he didn’t know what he talked about. That when they got to the penitentiary, bear in mind it was the same day, the same night of the same morning that they had obtained this confession after hours of beating, that they took him to the warden’s office, and that there Van Raulston again beat [fol. 338] this defendant for a length of time, and that finally after a period of an hour and a half or two hours he finally said yes to his questions because of the torture and beating that they had inflicted on him. And, Gentlemen, as the confession will show, that it was not a statement that the defendant made of his own free will, but it was a question asked him, and that they beat him until he answered that question to their satisfaction, and they asked another, and they continued that process until he would answer to their satisfaction, and that is the kind of a confession that was obtained in the penitentiary, and that was within the same day that this one was obtained here, and that he was under the same influence and same fear, and suffering from the beating that he had suffered when they beat him in the county attorney’s office. That after that they took this defendant down and showed him the electric chair and put him in a cell in the death row that night. That later, the morning of the preliminary hearing here, that Cheatwood, Vernon Cheatwood, the Governor’s special investigator, there again, at the penitentiary that morning, beat this defendant again before bringing him down here to the preliminary trial. That under all that time that this defendant had not had an attorney to represent him, that he had no one to consult with all that time, and again that the information was not filed by the county attorney until after the beating and the confession was obtained. That during the preliminary trial that this defendant had no attorney to represent him. Now, the evidence will show that whatever statements that the defendant made, he made because of fear, force, and violence that was used upon him.

O, yes, I almost forgot to bring in the fact that during the time he was in the county attorney's office, sitting there in the chair, surrounded by officers, that they brought in a pan of bones which the sheriff of the county said were [fol. 339] the bones of a little child, the Rogers child, that was burned, and part of the bones of Mrs. Rogers, and the teeth, and other bones and brought them and set them down on his lap for the purpose of inducing fear and dread in the defendant's mind in order to obtain a confession. Gentlemen of the Jury, the facts will show further that at the time of the fire that Clarence Keys, a deputy sheriff of this county, living at Fort Towson, was the first officer I believe on the scene, and that before the embers had died away, he began raking the ashes back from the fire of that house. That he raked all the ashes back from the side of the house one way, and cross raked and raked the ashes off to the hard ground, searching carefully, minutely, trying to find the axe or some weapon. The evidence will further show that the Governor's special representative, after obtaining this confession, went to the home of Mr. Colclasure, the father of Mrs. Rogers, the deceased, the father-in-law of Mr. Rogers, and the grandfather of the little boy that was burned to death, in the early morning, and that going into the Colclasure home, he pulled out of his coat a blackjack, and that he told Mr. Colclasure, in the presence of Vernon Colclasure's wife, that he had beat this defendant for hours with that blackjack and that he got a confession out of him, and they would send him to the chair and he would burn. That he had not had any sleep all night, that he had been up all night getting that confession. The evidence will show that Vernon Cheatwood was registered at the Webb Hotel, and that after obtaining that confession, that he went into the hotel one evening and he said to a porter, "Boy, go up to my room and get my nigger beater." That the boy went up to his room and got a blackjack and brought it and gave it to him in the lobby of the Webb Hotel, and that Cheatwood, holding that blackjack in his hand in the hotel, in the presence of a number of people, [fol. 340] boasted to them that he had used that blackjack for six hours in beating this defendant and that he obtained a confession after beating him for six hours. That he said he used the hard end for awhile, and the soft end for a while, and that would bring it out of them. Gentle-

men of the Jury, if we produce these facts, as we will, we are going to ask at your hands an acquittal, that you find in your verdict that the defendant is not guilty of the crime that he is charged with.

CLARENCE KEYS, in behalf of the defendant in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Belden:

Q. Your name is Clarence Keys?

A. Clarence Keys is my name.

Q. Where do you live, Mr. Keys?

A. Fort Towson.

Q. How long have you lived in this county, Mr. Keys?

A. About 35 years.

Q. Mr. Keys, on December 31, 1939, were you a deputy sheriff?

A. Yes sir.

Q. In this County?

A. Yes, I was.

Q. Were you in January, 1940?

A. Yes.

[fol. 341] Q. Mr. Keys, do you recall the burning of the Rogers home?

A. Yes.

Q. And at that time you were a deputy sheriff?

A. I was.

Q. Did you go to the scene of the burning of the Rogers house?

A. I was the first law there.

Q. And in fact that was in your district?

A. Yes.

Q. You live how close to that?

A. About a mile.

Q. About a mile?

A. Yes.

Q. Mr. Keys, after the house had burned down, did you make any search of the ashes?

A. I did.

Q. Will you tell the jury in your own words what you did in making your search?

A. The next morning after the house had been burned down, the night it burned down, I asked some of the boys to go and look for the axe. That was the first time I asked them about it. They went and looked and couldn't find it. I said the axe is bound to be in the ashes of the house.

Q. Now, just this, tell what you did, and not what you told anyone else.

A. That is what I was looking for. I was looking for the axe in the ashes, the reason I was explaining that part.

Q. All right.

A. The next morning I was over there. I took my garden rake with me the next morning early, eight or nine o'clock when I got there. I started on the east side, the east window [fol. 342] down. I raked the ashes from the ruins of the house off from where the house was, until I went across to the north side and I started in and raked back to where I had raked the ashes off completely where the house was to the west side.

Q. Did you rake off the ashes?

A. I raked the first off, and I raked the next to where I had raked it off.

Q. You raked from one direction, and then raked in another direction?

A. I raked across and back. When I come back I would rake the ashes to where I had raked the first from.

Q. Did you rake it off the site where the house was, turn your rake into the solid ground?

A. I raked to the fresh dirt.

Q. Did you rake into the fresh dirt?

A. About to it, not into it much.

Q. What were you looking for?

A. Six shooter, shot gun, or axe, or razor.

Q. Did you find anything?

A. Yes.

Q. What?

A. Over next to the bed where the little baby was I found two little toy guns.

Q. About how big?

A. (Indicating).

Q. Did you find anything else?

A. I found bolts, and washers, and some buttons off of overalls, and some off of shirts.

Q. You even picked up things as small as buttons?

A. Yes.

[fol. 343] Q. Did you find in your search of that anything of any axe?

A. No, I didn't.

Q. In your opinion could there have been an axe in the ashes?

A. I tell you, if the axe was found, I wasn't there when the axe was found. They said they found the axe where I had raked the ashes away. And it must have been three or four or five inches to be where you could not rake it up, and if it was there I couldn't have reached it with the rake.

Q. Did you see the hole after they said they got the axe?

A. Yes.

Q. Was that down in the ground?

A. Yes.

Q. And if it had been down in the ground that way, your rake would not have reached?

A. No sir. It was about that deep (indicating).

Q. About that deep?

A. Yes, sir.

Q. Was that down in the ashes or in the ground that deep?

A. In the ground.

Q. Mr. Keys, have you lived on the farm, or timber and woods?

A. Yes.

Q. And have used an axe?

A. Yes.

Q. Hunted?

A. Yes.

Q. Fished and trapped?

A. Yes.

Q. Have you had experience taking axe handles out of axes or burning them out?

A. Yes, I have burned one or two out.

[fol. 344] Q. In your experience would you say if that axe was under ground five or six inches that the handle could have been burned out of it?

A. I never tried to burn one out, I couldn't say that, and it underneath the ground like that.

Cross-examination.

By Mr. Lattimore:

Q. When was it that you went out there?

A. The night the house burned.

Q. And that night you were raking?

A. No, next morning.

Q. About what time?

A. Around about eight o'clock.

Q. Anybody with you?

A. Yes, several were out there. There was a car there when I got there. There were several boys I don't know. One was supposed to be here this morning. I don't know what his name is. He lives at Fort Towson.

Q. Do you know any other people who were there with you?

A. While I was raking, a fellow named Horn, Clarence Horn.

Q. Were there any officers?

A. Julius Polin was.

Q. Anybody else helping you rake?

A. Yes, another boy helped me a little, but I was standing right by the side of him. I would walk along and tell him where to rake.

Q. You just had one rake?

A. Yes.

Q. And it was just an ordinary garden rake?

[fol. 345] A. Right.

Q. You say you raked the ashes off the site of the fire?

A. Yes.

Q. Did you rake it clean?

A. Yes.

Q. Kind of hard to rake with a garden rake, weren't they?

A. A little hard but by patience with it you can take it off.

Q. What kind of ground was that where the fire was?

A. It was kind of soft ground, so much dust had collected under the house.

Q. Was it level?

A. Kind of level but under the house (indicating), about as high as this, three or four inches, I guess, collected under it.

Q. Was the ground underneath the house level?

A. Yes.

Q. Have you been out there since then?

A. I have been out there since then once.

Q. Is the ground in the same condition now?

A. No.

Q. They have not plowed it, have they?

A. No, but somebody has been out there digging. There have been several places dug out down there.

Q. If you have been there since the fire, don't you know the ground is decidedly uneven and bumpy where the fire was?

A. Yes, a little bit.

Q. Quite a bit higher toward the center than it was toward the eaves?

A. Well, not too much.

Q. You moved all the beds and things, moved them off from the site of the fire?

[fol. 346] A. Just moved them back.

Q. Did you move them off the site of the fire?

A. No, there wasn't any fire at that time. We just set them back.

Q. What do you mean by setting them back?

A. Where we just got *thru* raking.

Q. And each time you would go to cross-rake you would move them?

A. Didn't have to move them but once.

Q. Just moved them once?

A. Yes, I didn't rake the place but one time.

Q. You say you raked the ashes off the ground and raked them back?

A. No, I raked them off. The first time I raked from this side of where the house was, then when I raked again I raked the next tier to where I moved them from. When I got through the last one was there, and the first one was out.

Q. Which side of the house did you start on?

A. East side.

Q. And after you raked off that side, you raked the ashes from the west side over on the ground on the east side?

A. No sir.

Q. Where did you rake the ashes from the west side?

A. Two or three feet back.

Q. Didn't you rake the ashes over to the ground on the east?

A. I started from this side, raked the ashes off the first tier, and raked back to where I had just raked from.

Q. Did you, with that rake, clean off the ashes down in every hole on the whole ground where that house had stood?

A. I run—in some places I did not.

Q. In some places, you did not?

[fol. 347] A. Near the fire place where there was a lot of brick, we had a lot of brick moved out but didn't go underneath where the hearth was.

Q. There was at that time a lot of brick and still are where the flue was on the east side of the house, wasn't there?

A. I don't remember whether there were or not.

Q. You did not rake any brick away from the east side where the flue had been near the window?

A. There was not any where the window was on the east side. I am talking about the front room. There was no brick there.

Q. You are sure of that?

A. Yes.

Q. Then the ground that you raked on the east side did not have any brick on it?

A. No, not when I raked it.

Q. Could you tell whether or not there had been chickens scratching in that dirt around under the house?

A. No, I could not.

Q. There wasn't any solid foundation under the house?

A. No.

Q. And the chickens and pigs and anything else around there could get under the house couldn't they?

A. Sure.

Q. You didn't know what the murder had been committed with, did you?

A. No sir.

Q. You didn't know what kind of weapon had been used?

A. No sir.

Q. You were just raking to see what you could find?

A. Anything.

Q. That might explain the murder?

[fol. 348] A. Anything I could find.

Q. At that time the X-ray pictures of the bodies had not been taken had they?

A. I had not seen them; I don't think so, no, for they had moved them that night.

Q. Did the sheriff tell you to go out there and make that search?

A. No sir.

Q. Did you report to the sheriff?

A. I called the sheriff and could not get him.

Q. You did not report to the sheriff about your raking?

A. The sheriff came the next morning. I was raking when he got there.

Q. What kind of weather was it?

A. Cold and frozen, wind blowing out of the north.

Q. Did you have any rain or snow?

A. No.

Q. Did it rain or snow within the next few days after the fire?

A. Yes.

Q. What day was that?

A. I don't know what day it was, but it did.

Q. The ashes were loose when you rake, hadn't been settled by the rain?

A. No, the only place that settled was where we poured water to get to the bodies, me and one of the boys poured water, making a trail to the bodies.

Q. Weren't brick scattered around the ground near where the body of Mr. Rogers was?

A. I did not see any there.

Q. You didn't know that any axe had been used, did you?

A. No sir, I did not.

[fol. 349] Q. What kind of roof was there on that house when it burned?

A. The kitchen had a tin roof, but I couldn't tell you what the front room had.

By the Court:

Q. In order to clarify it for the jury, was there a cook stove in the kitchen?

A. Yes sir.

Q. Was there a brick flue there?

A. I think there was in the kitchen, I am not sure about that.

Q. Was there a brick flue in the house anywhere?

A. I am not sure. There was a fireplace in the west end of the house. It was brick.

Redirect examination.

By Mr. Belden:

Q. Mr. Keys, your name is endorsed on the information as a State witness, and you testified for the State in the preliminary hearing?

A. Yes.

Q. Practically the same statement of facts that you just testified to?

By Mr. Lattimore: Objected to as incompetent, irrelevant and immaterial, and an attempt to bolster the testimony of his witness. We have not asked him anything about his testimony in the preliminary hearing. They are trying to bolster it up.

By Mr. Belden: I think we have the right to show that this man was subpoenaed by the State and that he was not used. That is all, Mr. Keys.

Witness excused.

[fol. 350] **CLARENCE HORN**, in behalf of the defendant in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Belden:

Q. You may state your name, Mr. Horn.

A. C. H. Horn.

Q. Where do you live, Mr. Horn?

A. Swink.

Q. Is that in this county?

A. Yes.

Q. How long have you lived in this county?

A. I have been living here about ten years.

Q. What is your occupation?

A. I have been working for the county.

Q. In what capacity?

A. Mechanic.

Q. Mechanic for the county?

A. Yes.

Q. How far do you live from Fort Towson?

A. Four miles.

Q. Do you remember the occasion of the burning of the Rogers' home?

A. Yes.

Q. Were you there the next morning?

A. I was there the next morning after the fire that night.

Q. About what time, Mr. Horn?

A. I judge it was around nine thirty or ten o'clock.

Q. Was Clarence Keys, a deputy sheriff, there?

A. Yes sir.

[fol. 351] Q. Did you observe him doing anything there at that time?

A. He was looking around and had some rakes, raking around in the ashes.

Q. Had a rake?

A. Yes.

Q. Did you watch how he raked?

A. Yes.

Q. Tell the Court and jury what you saw.

A. He had one of these fire rakes, wasn't a garden rake, but had long teeth in it. He raked it off to the hard ground.

Q. Raked what off?

A. Ashes.

Q. Did you assist him any?

A. I raked a little bit, not much.

Q. Were all the ashes raked off the site of where the house was?

A. Yes sir.

Q. During that time did they find anything in the ashes that he saved or picked up?

A. We did not.

Q. Not anything?

A. I did not see anything.

Q. To refresh your memory, buttons or anything?

A. No sir.

Q. You did not see anything?

A. No sir.

Q. Did you look at that after he got through?

A. Yes, I was there when he got through.

Q. State what the condition of the ground was where the house had been.

[fol. 352] A. Well, there was a place about the size of the house where the blocks were sitting, just small holes in the ground about a foot square, I judge. The holes

were not over four or five inches deep, and the ground was clean, there wasn't any ashes on it. The char-coals had been raked off.

Q. What holes are you talking about?

A. Where the blocks for the foundation were.

Q. It was sitting on blocks?

A. Yes.

Q. And the holes were cleaned out?

A. Some didn't have much, and some were sitting flat on the ground.

Q. Were you out there some ten days later or more when the officers said they found an axe there?

A. No sir, I wasn't out there.

Q. In your opinion, could there have been an axe lying on the site of the house after Mr. Keys got through raking there and he not have found it?

A. I don't see how it could have been.

Cross-examination.

By Mr. Lattimore:

Q. You say it was not a garden rake?

A. No sir, a forest fire rake, with long teeth, as well as I remember.

Q. Do you know where that rake came from?

A. No sir, I don't have any idea.

Q. Was he raking when you got there?

A. Yes sir.

Q. You don't know how long he had been raking?

A. I don't know, sir.

Q. You don't know what he had found?

[fol. 353] A. No sir.

Q. You don't know what he was looking for?

A. No, I asked him and he said he was just looking to 'see what he could find.

Q. And there were burned beds, iron beds and springs, and metal roofs around there on the scene of the fire, weren't there?

A. Yes sir.

Q. And a cook stove had been burned?

A. Yes sir.

Q. And brick around in the hearth there?

A. Yes sir.

Witness excused.

W. D. LYONS, the defendant, in his own behalf in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Belden:

Q. You are the defendant in this case?

A. Yes sir.

Q. W. D., did you go to the Hall store at Fort Towson on a Saturday, strike that. Did you know of the burning of the Rogers home last January—the 31st of December, 1939?

A. I heard of a home burning down, but I didn't know whose it was.

Q. You heard of a home burning down, but you didn't know whose it was?

A. Yes sir.

Q. You heard of a home burning down, but you didn't know whose it was?

A. Yes sir.

Q. You knew of that happening?

A. Yes sir.

[fol. 354] Q. On that day, the morning of that night, did you go to the Hall store at Fort Towson and buy some shot gun shells?

A. You mean Saturday morning?

Q. Yes.

A. I bought them Saturday afternoon.

Q. You bought them Saturday afternoon?

A. Yes sir.

Q. Do you recall who waited on you?

A. Mrs. W. A. Hall.

Q. Had you purchased shot gun shells there before?

A. Yes sir, that is where I bought all my shells.

Q. What did you do with these shells that you purchased before that day?

A. What did I do with the shells?

Q. That you purchased before that Saturday?

A. I would go hunting with them.

Q. You went hunting with them?

A. Yes sir.

Q. That was on Saturday. Now the Sunday, the next day, did you go hunting?

A. Yes sir.

Q. What kind of gun did you have?

A. A single barrel 12-gauge shot gun.

Q. Whose gun was it?

A. Sammie Green's.

Q. Where did you go when you went hunting?

A. I went pretty close to a half a mile west of the Quarters in George Hall's pasture.

Q. You went where?

A. Pretty close to a half a mile west of the Quarters in George Hall's pasture.

[fol. 355] Q. In George Hall's pasture?

A. Yes sir.

Q. Where was that from the Rogers house?

A. It was about a half a mile from the house that burned down.

Q. Which way?

A. Southeast.

Q. That morning, did you do any shooting?

A. Yes sir.

Q. Tell the jury what it was. Go ahead and tell what happened.

A. I shot at a rabbit sitting down on the south side of the fence. I was shooting north, and the rabbit still sat. About the time I got ready to shoot again the rabbit run and I shot again and miss both times.

Q. Where did you go from there?

A. I hunted all over the pasture, and in the field south of the fence, and from there back to the quarters to Bus Fleeks' house.

Q. To Bus Fleeks' house?

A. Yes sir.

Q. Did you carry the gun together or did you not have it wrapped up in town?

A. I had it wrapped up in town.

Q. Why?

A. Because I did not have any hunting license.

Q. And you carried it wrapped up while you were in town?

A. Yes sir.

Q. And when you got to the country what did you do if anything?

A. I put it together.

Q. You didn't have any hunting license?

A. No sir.

[fol. 356] Q. Did you know it was a violation of the law to hunt without a license?

A. Yes sir.

Q. Was there anyone at Bus Fleeks' that afternoon?

A. There was several there.

Q. How long did you stay at Bus Fleeks'?

A. Off and on all the evening.

Q. About what time did you leave there?

A. Pretty close around six o'clock.

Q. What time would you say it was with reference to sundown?

A. I was from Bus Fleeks to Dona Scott until sundown.

Q. Who is Dona Scott?

A. The one who runs the cafe.

Q. Did you make a purchase in the cafe?

A. I made several purchases that evening.

Q. What did you buy if anything?

A. I bought a hamberger.

Q. After that where did you go?

A. I left Dona Scott's about sundown and went home.

Q. How far is it from Scott's to your home, to your mother's home?

A. Something like a mile and a quarter.

Q. Who was at home when you got there?

A. My sister and Curtis Thompson and my grandmother and the little kids.

Q. Was your mother there?

A. No sir.

Q. Where was she?

A. She was gone to church.

Q. When did you first learn of the burning of the Rogers home?

[fol. 357] A. About nine thirty the next morning.

Q. About nine thirty the next morning?

A. I heard of the house burning down.

Q. Were you arrested some time after that?

A. I was arrested on the 11th day of January, on Thursday night, Thursday evening.

Q. On Thursday night?

A. Yes sir.

Q. Where were you at that time?

A. I came home when I got arrested, when I was arrested.

Q. Where were you making your home? Where did you live?

A. I lived at Hugo.

Q. Who with?

A. My mother-in-law.

Q. With your mother-in-law?

A. Yes sir.

Q. Go ahead and tell the Court about what happened at the time you were arrested at your mother-in-law's.

A. I came home about six thirty or seven o'clock that evening, and two men stuck guns on me.

Q. Speak louder.

A. Two men stuck guns on my, told me to get my hands up.

Q. Were you there when the men first came?

A. No sir.

Q. Where were you?

A. I went out to get a drink of whiskey I had hid on the railroad.

Q. Did you meet anyone as you were coming back from there?

A. Yes sir.

Q. Who was that?

A. Ennis Aikens.

[fol. 358] Q. Was that the boy who testified yesterday?

A. Yes sir.

Q. Tell what happened.

A. Ennis Aikens says he seen some car drive up down close to where I lived and he said it might be the laws. I told him go down and see what was going on. And I never did see him any more. When I came home later two men stuck guns on me.

Q. Who were the two men?

A. One was Mr. Reasor Cain.

Q. One was Reasor Cain?

A. Yes sir.

Q. Did you know who the other was?

A. No sir.

Q. Where were you when they put the guns on you?

A. At my mother-in-law's home.

Q. Who put the gun on you?

A. Both of them.

Q. What did they do to you then, if anything?

A. One of the officers, the officer that I don't know his name, come to the other man and told him to hold his gun

on me while he tied me. I had on overalls and a pair of pants under them and a belt. He pulled my belt off, told me to put my hands behind me and tied my hands together and got them hand over hand and got his gun back, and put his gun in my back.

Q. How were your hands tied?

A. Behind me like that, and they marched me to Jefferson Street.

Q. Where is Jefferson Street from here?

A. It is the street (indicating).

Q. South, and runs east and west?

A. Yes sir.

[fol. 359] Q. And you were coming in what direction?

A. Coming this way, coming toward the court house.

Q. Go ahead and tell the story as it happened.

A. The officer that had me tied with the belt struck my head with his fist and knocked me down, kicked me, told me to shut up that hollering, and the other officer, three or four blocks from the jail, he seen a piece of one-inch board lying on the street side. He told Mr. Reason Cain to break him a club off of the piece of one-inch board, and walked a little further, and struck me across the forehead, over the right eye, and knocked me down, and kicked me again, and threatened me.

Q. Which one did that?

A. That was the one I didn't know.

Q. Go ahead.

A. And we came further to a tree west of the jail house and he bumped me up against that tree.

Q. Bumped what against the tree?

A. My head. He told Mr. Reason Cain to come over here and get some more officers, and we will drag him through colored town and let the rest of the negroes learn a lesson. And Mr. Hawkins came back and said there wasn't any officers here, and they brought me to the jail and searched me and turned me over to the jailer, Mr. Leonard Holmes. The jailer and Floyd Brown, Mr. Floyd Brown, carried me to the top floor of the women's side and the jailer struck me in the mouth with the heavy keys he had, and Floyd Brown kicked me, and hit me with his fist.

Q. Who is Floyd Brown?

A. He was deputy sheriff, and the jailer he put me in jail and I stayed about five minutes and Floyd Brown come back

and got me again, taken me to the bottom floor of the jail where there were some more officers, and they brought me [fol. 360] from there over to a room "object" to the sheriff's office and the officers started beating me, beat me, bumped my head against the wall, knocked me down, kicked me in the stomach and ribs for about two hours. One of them beating me was Mr. Floyd Brown, Mr. Howard Rorie, and one investigator that I didn't know, and that low highway patrolman.

Q. You don't know his name?

A. No sir.

Q. Was it a heavy set highway patrolman?

A. Yes sir, I don't know his name, and they did that about two hours, and the sheriff he came in and set down and questioned me about 30 minutes, and the sheriff he got up and went out and the officers came in again and went to beating me.

Q. What officers came in and went to beating you?

A. Mr. Floyd Brown and Mr. Howard Rorie, and that same investigator.

Q. You don't know what his name is?

A. No sir. There was six that whipped me that night but I didn't know all their names, and the sheriff came back in the next time and stopped them.

Q. Then what happened?

A. Then Mr. Van Raulston and Mr. Floyd Brown carried me and turned me over to the jailor and the jailor carried me and put me in jail.

Q. What part of jail did they put you in?

A. That time they put me in the men's department.

Q. And before you had been in the women's department?

A. Before I had been.

By the Court: I didn't understand.

Q. When they first took you up you went to the women's department?

A. Yes sir.

[fol. 361] Q. And when they took you back they put you in the men's department?

A. Yes sir. And they didn't question me any more for several days after that.

Q. And they didn't question you any more for several days after that. All right.

A. Eleven days later, about six thirty, one evening, the jailer and the highway patrolman—

Q. Which highway patrolman?

A. The low heavy set one and Mr. Floy- Brown came and got me and carried me to the bottom floor of the jail, and the heavy set highway patrolman went to striking me on the back of the head and neck with a blackjack, and they brought me here and was going up stairs, the highway patrolman was still striking me with the blackjack, and Mr. Cheatwood told him not to hit me on the head with the blackjack, and said "I know how to get it out of him when we get him up here."

Q. What was it Cheatwood said?

A. Told him not to hit me on the head with the blackjack.

Q. Told who?

A. The heavy set highway patrolman.

Q. What did Cheatwood say?

A. He said he knowed how to get it out of me after he got me up stairs.

Q. Where did they take you?

A. Taken me to the county attorney's office.

Q. All right. Go ahead and tell the jury, in your own words, what they did and what was said.

A. Then Mr. Cheatwood told the heavy set highway patrolman to handcuff me, and the heavy set highway patrolman put the handcuffs on me and set me in a chair like [fol. 362] this (indicating), handcuffed, and Mr. Cheatwood put a chair in front of me about—so his feet would be eight or ten inches from me, and Mr. Cheatwood had a blackjack in his hand, and the highway patrolman was sitting on one side of me, and Mr. Reasor Cain was sittin—standing behind me, and the county attorney, he was one one side of me, asking questions, and Mr. Cheatwood was yelling, "You answer that prosecutor's questions," and beating me all the same time. (Beating you with what?

A. Blackjack.

Q. Can you describe it?

A. About two inches wide and about three-fourths of an inch thick on the end, and about a foot and a half long, and every time he hit me with it something in it would rattle like buck shot of steel balls.

Q. Where was he striking you?

A. On my knees, hands, arms, and legs.

Q. Did anyone else strike you?

A. Mr. Reasor Cain he would, every once in awhile, he would hit me from behind with his fist.

Q. Who is Reasor Cain, if you know?

A. He was the railroad detective.

Q. He stood behind you?

A. Yes, sir, he stood behind me, and Mr. Cheatwood he would whip me on the legs and arms and knees and hands about an hour and a half at a time and he would put up and Mr. Reason Cain he would take it awhile, and yelling questions at me all during that time. When Mr. Reasor Cain got tired the highway patrolman would take it awhile, about an hour and a half to two hours each, and they beat me that way all night and yelling questions.

Q. State some of the questions they asked.

A. They would say, "You killed those people, didn't you? You God damned black son-of-a-bitch, you are going [fol. 363] to tell me before we turn you loose." I told them I didn't know nothing about that crime. He said I was going to sing a different song before forty-eight hours from now.

Q. Who said you were going to sing a different song before forty-eight hours from now?

A. Mr. Cheatwood.

Q. All the time, did they leave you sitting in the chair, or did they change you some time?

A. They would change me some time.

Q. What did they do then?

A. The highway patrolman and Mr. Cheatwood and Mr. Reasor Cain would take me up and bend me across a table, and bend me across a table, and Mr. Cheatwood beat me on the back of the head with the blackjack, and set me back down in the chair and start beating me on my legs again and arms.

Q. And all the time they were trying to get you to say what?

A. And all the time they were trying to get me to say that I killed those people.

Q. During that time did they bring a pan of bones and put on your lap?

A. They brought a pan of bones there about two-thirty in the morning.

By the Court (Q). About what time?

A. About two thirty in the morning.

Q. Go ahead and tell about that.

A. And they placed those bones on my lap, then he would—

Q. —Whose bones did they say they were?

A. They said they was the bones of Mrs. Rogers, Mr. Rogers, and the baby, and I had never seen any bones of a dead person before, had I ever seen dead people before, and was I afraid of those bones on my lap in the pan. Mr. Cheatwood would lay the bones on my hands, such as teeth and body bones, and make me hold it and look at it, [fol. 364] wouldn't let me turn my head away, and beat me on the hands and knees.

Q. When they were beating you with the blackjack did it hurt?

A. Yes sir.

Q. Were they tapping you gently?

A. Ho sir, he was hitting me hard.

Q. Go ahead.

A. And kept on yelling questions and asking questions and finally about four thirty I couldn't stand any more of the beating and told him, and to keep from getting any more, I told him, and answered the officer's questions, but I didn't answer them with my own free will.

Q. You answered the questions that they asked you?

A. Yes sir.

Q. When they asked you a question then, were you telling them the truth, or were you just answering *answering* the questions they told you to answer?

A. I just answered the questions they told me to answer.

Q. Why did you do that?

A. Because I was tortured to it. I didn't want any more torture.

Q. Altogether, how many officers came in and took part in it?

A. The officers that was doing it was three officers.

Q. Who were they?

A. It was Mr. Cheatwood.

Q. Cheatwood.

A. And Mr. Reasor Cain.

Q. And that was the railroad detective?

A. Yes sir. And the heavy set highway patrolman.

Q. You don't know his name. Now, did any other officers come in during that time?

[fol. 365] A. Mr. Floyd Brown.

Q. The deputy sheriff.

A. Mr. Van Raulston, the deputy sheriff, and the sheriff, and the jailer, Mr. Leonard Holmes, and Harvey Hawkins.

Q. Who was he?

A. Highway patrolman.

Q. Another highway patrolman?

A. Yes sir.

Q. During that time did the sheriff, Roy Harmon, do any of the beating?

A. No sir.

Q. He didn't do any of it?

A. No sir.

Q. Did anyone else come in?

A. The assistant County Attorney was in there a part of the time.

Q. The assistant County Attorney?

A. The assistant County Attorney and the County Attorney, both.

Q. Did they take any part in the beating?

A. No sir.

Q. Was there anyone else that came in during that time that you remember?

A. There was one but I don't know his name.

Q. Now, did they prepare a statement for you to sign?

A. Yes sir.

Q. When was that?

A. I signed the statement the next day about two o'clock.

Q. The next day about two o'clock?

A. I signed that statement the same day about two o'clock.

Q. About what time was it, W. D., when they got through questioning you in the county attorney's office?

[fol. 366] A. It was about four thirty that morning.

Q. Then where did they take you, if anywhere?

A. They taken me over to the sheriff. The sheriff taken me over to the jail, and Mr. Leonard Holmes, the jailer, put me in jail about ten to twenty- minutes, and he came and got me out again and carried me back to the county attorney's office.

Q. Carried you back to the county attorney's office?

A. Yes sir.

Q. Was there any more questions or then what did they do?

A. They taken me to the same office down by the sheriff's office.

Q. The side room?

A. Yes sir.

Q. Then what happened?

A. The sheriff sat there with me until the other officers went and ate breakfast.

Q. Then what happened?

A. When the officers came back they carried me, told me to get up and come and go with them.

Q. Before that, W. D., when they got through up in the county attorney's office that night, tell the Court and the jury, what your condition was when you tried to walk.

A. I couldn't hardly walk and the sheriff had to help me all the way to the jail.

Q. What did he do?

A. He had me by the arms to keep me from falling down that steps.

Q. The next morning after the officers had their breakfast, where did they take you?

A. Taken me to the scene of the crime.

[fol. 367] Q. Who took you out there?

A. Mr. Harvey Hawkins, the highway patrolman.

Q. Who else?

A. The assistant County Attorney and Mr. Floyd Brown, the deputy sheriff, and Mr. Cheatwood.

Q. Where did they take you to?

A. Taken me to the scene of the killing.

Q. Go ahead and tell the Court and jury what took place.

A. When the got me to the scene of the Crime, Mr. Cheatwood and the county attorney stood around there a little while, while Mr. Floyd Brown and Mr. Harvey Hawkins searched over the place for something. Mr. Cheatwood and the assistant County Attorney, they drove off in the patrolman's car, and Mr. Harvey Hawkins and Mr. Floyd Brown, I told them I was cold and they made me a big fire.

Q. How far was this fire they built up away from where the house was, or had been?

A. It was about as far as to that second door.

Q. From where you are sitting to the second door?

A. Yes sir.

Q. Did you go over and stand by the fire?

A. Yes sir.

Q. How were you dressed?

A. I was dressed in overalls and I was handcuffed.

Q. Have an overcoat on?

A. No sir.

Q. Was it cold that morning?

A. Yes sir.

Q. You went to the fire and stood there?

A. Yes sir.

Q. What did they do if anything?

[fol. 368] A. They was searching over the place.

Q. Go ahead.

A. I was standing by the fire with my back turned to them. So I looked up and seen Mr. Cheatwood and the assistant County Attorney drive back with Mr. Vernon Colclasure.

Q. Mr. Vernon Colclasure?

A. Yes sir, and I turned back to the highway patrolman. He had an axe in his hand, and Mr. Harvey Hawkins says, "You put this axe down here."

Q. Hawkins said "You put this ace down here?"

A. Yes sir.

Q. What did you say?

A. I said I didn't know anything about the axe.

Q. Did he show you where he claimed he got the axe?

A. Yes sir.

Q. Did you see where he claimed, did he show you?

A. I seen the hole. I didn't see any print of the axe.

Q. How deep was the hole?

A. About four or five inches deep.

Q. You say you didn't see a print of where the axe had been in there?

A. No sir.

Q. Was that in the ashes or dirt?

A. That was in the dirt.

Q. Then what happened, if anything?

A. Then Mr. Cheatwood told me to show him where I was hunting out there that Sunday. I taken them about a half a mile southeast from that place, and when we got there I walked down the fence row along which I was shooting from,

where I dropped the shells and I was about as far as from here to that door from Floyd Brown, and Mr. Cheatwood was back further west. I picked up the shells. They were [fol. 369] lying about three feet apart when I picked them up. I gave them to Floyd.

Q. How close was the officer to you when you picked them up?

A. About as far as to the door.

Q. Were they scattered?

A. Yes sir.

Q. Were you looking for them?

A. Yes sir.

Q. Tell the jury the condition the shells were in when you picked them up and gave them to the officer.

A. They were in the same condition that they was in when they came out of the gun.

Q. What do you mean by that?

A. They wasn't mashed then.

Q. They were not mashed and twisted when you gave them to them?

A. Yes sir.

Q. Did you hear one of the State's witnesses yesterday that you got them and they were twisted and some grass twisted and they were down in a little hole?

A. Yes sir.

Q. Is that correct, W. D.?

A. No sir.

Q. Those two shells were the shells you had—

A. —shot.

Q. They are empty. That you shot at the rabbit that morning?

A. Yes sir, between nine and eleven o'clock.

Q. Where did you go?

A. The highway patrolman and the assistant County Attorney was on about two blocks from us on the highway, [fol. 370] and we went out there and taken Mr. Colclasure home.

Q. That was Vernon Colclasure?

A. Yes sir, and we came back to the jail.

Q. About what time?

A. About eight thirty o'clock when we got back to the jail.

Q. What did they do with you?

A. They put me in the women's side of the jail.

Q. On the women's side and not in the men's department?

A. Yes sir, on the women's side.

Q. At that time, I will ask you if there was a knot over your right eye?

A. The knot had gone down but the black place was still under my eye.

Q. Under your right eye?

A. Yes sir.

Q. You had received that how many days before that?

A. Eleven days before.

Q. That was the first time they gave you a beating. Was your right eye swelled shut?

A. Yes sir, it was closed, my lip broken, and nose bleeding.

Q. How long did your nose bleed after that?

A. It didn't bleed long but this right eye stayed a day or two.

Q. After they put you in jail that day what did they do with you then, if anything?

A. Then the assistant County Attorney, about two o'clock and Mr. Cheatwood, and the heavy set highway patrolman, and Mr. Haskell Floyd, they brought a statement up there, and the assistant County Attorney told me to sign my name to it. I asked him what I was signing, I asked Mr. Cheatwood what was I signing and Mr. Cheatwood spoke up [fol. 371] and said "never mind."

Q. Mr. Cheatwood said "never mind?"

A. Yes sir.

Q. What did you do?

A. I signed my name. In about fifteen minutes after that they taken me—

Q. Up to that time, had you ever had an attorney to consult about your rights?

A. No sir.

Q. What did they do?

A. About fifteen minutes later they carried me in front of the jail and Mr. Cheatwood and the sheriff had me take my picture with them.

Q. They took your picture?

A. Yes sir.

Q. Then what did they do?

A. Then Mr. Reasor and Floyd Brown——

Q. Reasor Cain?

A. The railroad detective.

Q. And Floyd Brown, the deputy sheriff?

A. Yes sir.

Q. What did they do?

A. They put me in their car and carried me to the Antlers jail.

Q. About what time did you get over there?

A. It was about four o'clock.

Q. Where did you go from there?

A. Then it was sundown, dark, Mr. Van Raulston——

Q. Who is he?

A. A deputy sheriff.

[fol. 372] Q. All right. Who else?

A. And Mr. Roy Marshall, came to the jail at Antlers and got me and carried me to McAlester.

Q. They took you to McAlester?

A. Yes sir.

Q. During the time you were on the way from Antlers to McAlester, did the deputy sheriff, Van Raulston, make any threats?

A. Yes sir.

Q. What were the threats?

A. Said, "We ought to hang him."

Q. What?

A. Said, "We ought to hang and bury him right here."

Q. Right there on the road?

A. Yes sir, and said, "We could tell the courts I run off, and they wouldn't know anything about it."

Q. Nobody would know anything about it?

A. Yes sir.

Q. Were you afraid of them?

A. Yes sir.

Q. After you got to the penitentiary tell what took place.

A. After we got to the front door of the penitentiary Mr. Van Raulston asked where was Mr. Dunn, the warden, and a guard got the warden and brought him and Mr. Van Raulston told Mr. Dunn, the warden, he was bringing me there for safe-keeping. They brought me on the inside and Mr. Dunn, the warden, told Van Raulston to bring me on his office. Back in Mr. Dunn's office I sat on one side of the table, Mr. Dunn was on that other side, Mr. Van

Raulston and Mr. Marshall was on the west side of the table.

Q. About what time was that, W. D.?

A. Between ten and ten thirty.

Q. And that was in the same night of the same day that you had made this confession up stairs here?

[fol. 373] A. Yes sir.

Q. It was about what time of night?

A. About ten or ten thirty.

Q. Go ahead and tell what took place.

A. Mr. Dunn asked Van Raulston who had the gun that day and Van Raulston told him I had the gun. Mr. Dunn said, "That is the nigger that did the shooting."

Q. Mr. Dunn said, "That is the nigger that did the shooting?"

A. Yes sir. Mr. Dunn said, "That is the negro that hit the woman with the axe," and Mr. Roy Marshall said he couldn't carry the woman from a certain distance by himself and lay her on the porch without getting blood on him, and Mr. Van Raulston said, "He has already admitted some in the confession in the jail house."

Q. Van Raulston told the warden you had already made a confession, is that right?

A. Yes sir.

Q. Did the warden ask you some questions about this killing of Mr. Rogers?

A. Yes sir.

Q. What did you tell him?

A. I told him I didn't know.

Q. Then what happened, if anything?

A. Mr. Dunn and Mr. Van Raulston questioned me like that for about two hours.

Q. About two hours they questioned you?

A. And Mr. Van Raulston up and said, "I'll make him talk."

Q. Mr. Van Raulston said, "I'll make him talk"?

A. Yes sir.

Q. And up to that time you had said that you didn't know who killed them?

[fol. 374] A. Yes sir.

Q. And when Van Raulston come and said, "I'll make him talk," what did he do?

A. Come up and got a blackjack out of a desk and started whipping me on my knees, and hands, and legs, and

shoulders. He beat me like that and threatened me for about an hour and a half or two hours.

Q. They had already been questioning you about how long?

A. About two hours.

Q. This Van Raulston had been in the county attorney's office that morning when you made that confession?

A. Yes sir.

Q. He was there as a part of those when they were beating you then, is that right?

A. Yes sir.

Q. After he beat you with the blackjack while in the penitentiary, what did you do?

A. I finally gave in and answered the questions that they demanded.

Q. You finally gave in — answered the questions that they demanded?

A. Yes sir.

Q. And in the way they wanted them answered?

A. Yes sir.

Q. Then what happened?

A. Mr. Dunn——

Q. Pardon me—Why did you finally answer the questions the way they told you?

A. Because I didn't want to be tortured any more, and because I couldn't stand any more of the beating.

Q. All right.

[fol. 375] A. Mr. Dunn got a stenographer and the stenographer taken down the questions Mr. Dunn and Van Raulston asked me.

Q. Did they just say to go ahead and tell how it happened?

A. They asked me, "Didn't you—" and told me to answer them.

Q. While the stenographer was in there did they beat you?

A. No sir.

Q. That was before?

A. That was before.

Q. Go ahead.

A. When the stenographer——

Q. Just a moment. If they didn't beat you when the stenographer came in, why did you go ahead and answer the questions?

A. Because I didn't want to get any more beating.

Q. Go ahead.

A. The stenographer taken down the statement.

Q. He took down the statement?

A. Yes sir.

Q. Then what?

A. Mr. Van Raulston and Mr. Dunn went in the deputy warden's office, and the stenographer, and I and Mr. Roy Marshall sat in the warden's office. Then he went to the deputy warden's office and I followed him. Mr. Roy Marshall was looking at some kind of pictures in another paper on the desk. Mr. Dunn and Mr. Van Raulston was over mumbling low to the stenographer.

Q. Talking low to the stenographer?

A. Yes sir. I sat and nodded I don't know how long, and I asked Mr. Dunn for some water and they brought me some water.

Q. How long had you been without water?

A. Since I left this jail.

Q. And that was what time?

A. It was past 12 o'clock.

[fol. 376] Q. Since some time around two o'clock in the afternoon until twelve o'clock you had not had any water?

A. No sir. Then I told Mr. Dunn I was hungry, I hadn't had any supper. He sent a guard to take me to the kitchen to eat. We fooled around in the kitchen about 30 minutes and they brought me back to the warden's office, and Mr. Roy Marshall and Mr. Van Raulston was gone some place and the warden and the stenographer were still there. Then I sat down awhile longer and nodded, and the chaplain came in the deputy warden's office.

Q. The chaplain came in?

A. Yes sir, and the stenographer finished typing out the statement, and Mr. Dunn and Mr. Van Raulston and Mr. Roy Marshall, they had come back, and we went to the warden's office, and Mr. Dunn told me to sign my name on the statement. He had an ink pad and told me to put my thumbprint on it and mash it on the statement.

Q. In the presence of the chaplain were — threatened or beaten?

A. No sir.

Q. Didn't threaten you in the presence of the chaplain or the stenographer?

A. No sir.

Q. They told you and you signed it and put your thumb mark on the pad and on the paper?

A. Yes sir.

Q. Then what happened?

A. The chaplain and Mr. Dunn and the stenographer and Mr. Roy Marshall and Mr. Van Raulston all signed their names on it.

Q. Where did they take you, if anywhere?

A. Mr. Dunn sent for a guard and told the guard to take me down in the basement.

[fol. 377] Q. Told the guard to take you to the basement?

A. Where the death cells were and the electric chair.

Q. Go ahead and tell what happened.

A. And just a little before we got to the cell I passed right by the electric chair. He opened a door and put me in a cell about fifteen feet from the electric chair. So they kept me in there all night and the next day they carried me to the fourth story.

Q. Do I understand that they draw your attention or show you the electric chair?

A. No sir.

Q. They didn't show you the electric chair?

A. No sir, but I was where I could see it.

Q. Was anything said about the electric chair.

A. Mr. Dunn had already threatened me about how many men he helped send to death in the electric chair.

Q. And you were left down in the cell that night?

A. Yes sir, by myself.

Q. Do you know what cell that was called?

A. That was called the death cell.

Q. The death cell, death row?

A. They have got two death rows, one death row they keep you in until you get ready to be electrocuted, and the other is where they put you down by the electric chair about two days before they get ready to electrocute you. That is where I was. Next day they carried me up on "High."

Q. What do you mean by up on "high"?

A. On the fourth floor where they keep for safe-keeping.

Q. Did Mr. Dunn strike you or beat you?

A. No sir.

Q. He didn't do that? All right. Were you brought back down to Hugo for the preliminary trial?

[fol. 378] A. Yes sir. That was Saturday morning.

Q. That Saturday morning?

A. Yes sir.

Q. Now then, who brought you back?

A. Mr. Cheatwood.

Q. Mr. Cheatwood?

A. Mr. Reasor Cain, Mr. Van Raulston and two guards.

Q. Two guards from the penitentiary?

A. Yes sir.

Q. Now, before you left up there that morning, did Mr. Cheatwood talk to you?

A. Mr. Cheatwood?

Q. Answer yes or no.

A. Yes sir.

Q. He did?

A. Yes sir.

Q. Tell the Court and the jury what took place, if anything.

A. Mr. Cheatwood and Mr. Dunn carried me in his office, the warden's office. Mr. Cheatwood put handcuffs on me again and asked me was I going to get on the stand—

Q. Would you get on the stand, and what?

A. And swear that me and Mr. Van killed those people.

Q. If you would get on the stand and swear that you and Mr. Van, or you and Van killed those people?

A. Yes sir.

Q. What did you say?

A. I told him no sir.

Q. Go ahead.

A. He started beating me again with a blackjack. He struck me on top of the head, and hands and knees and arms, like he always did. He kept on asking me and I said yes, I would get on the stand.

[fol. 379] Q. And make that statement?

A. Yes, then he stopped beating me.

Q. Why did you tell him you would get on the stand and make that statement?

A. I told him that because I didn't want to be beat and tortured any more.

Q. Where did they take you to?

A. They put me in a car and started here with me. All the way down here he was threatening me.

Q. Who was threatening you?

A. Mr. Cheatwood.

Q. What do you mean by threatening you?

A. Told me if I didn't get on the stand and plead guilty I wouldn't get back alive.

Q. He told you if you didn't get on the stand and plead guilty you wouldn't get back alive?

A. Yes sir, and when I got here and had the preliminary trial I didn't get on the stand.

Q. Did you have an attorney to represent you?

A. No sir.

Q. Had you ever talked to an attorney up to that time?

A. No sir.

Q. After the preliminary trial what did they do with you?

A. Carried me back to McAlester.

Q. Do you remember how long it was after you were arrested before you got to talk to an attorney?

A. I first talked to an attorney about the 4th or 5th of February.

Q. Who was that?

A. Mr. Stanley Belden, you.

Q. I was the attorney you talked to?

[fol. 380] A. Yes sir.

Q. Where was that?

A. That was in the State penitentiary in the sergeant's office.

Q. Now, W. D., how old are you?

A. I'll be 23 in April.

Q. You were 21 when they arrested you?

A. Yes, sir.

Q. W. D., had you had trouble before and served a term?

A. Yes, sir.

Q. Where?

A. At McAlester.

Q. What for?

A. Well, burglary or robbery, the first one, I don't know which.

Q. What were you supposed to have stolen?

A. I didn't steal nothing.

Q. But you were charged with getting what?

A. I was charged with burglarizing a house.

Q. You may cross-examine him.

Cross-examination.

By Mr. Lattimore:

Q. How many terms have you served in the State penitentiary?

A. Twice.

Q. What were they for?

A. Once for burglary or robbery. I don't know what the other was for.

Q. You don't know what the other was for?

A. No sir.

Q. When you testified in the absence of the jury day before yesterday afternoon and were asked what you were [fol. 381] sent to the penitentiary for you said you didn't know, didn't you?

A. Yes, sir.

Q. And now you say you went for burglary once but you don't know what you went for the other for?

A. I stated one, what I went for that time, but that is what I was charged for.

Q. You went one time for chicken stealing, didn't you?

A. I don't know. I didn't steal no chickens.

Q. You went to the penitentiary for that, didn't you?

A. Yes sir, I went to the penitentiary.

Q. And you said in your confession that you made up there in answer to Mr. Dunn's questions that you had served time for burglary and chicken stealing, didn't you?

By Mr. Belden: Now, Court please, we object unless the record shows that that was a part of the confession.

By Mr. Marshall: That section in the confession, as I remember, was voluntarily withdrawn by the State when the prosecutor was reading it to the jury.

By Mr. Lattimore: It was withdrawn because of the fact that the defendant had not taken the stand and we not entitled to put it in, but it is here in the confession. It is competent now, the entire part of it.

By the Court: All right.

By Mr. Marshall: We still object to the reading of anything from the confession concerning the previous convictions.

By the Court: Overruled, exception allowed.

Q. In that confession the question is: "Q. Were you ever convicted of any crime and sent to the penitentiary? A.

Yes. Q. What for? A. Burglary and stealing chickens." Is that the way you answered at that time?

A. Yes.

[fol. 382] Q. When did you get out of the penitentiary the last time?

A. October 4, 1939.

Q. That was just a few months before this murder down at Fort Towson, wasn't it?

A. That is right.

Q. You say you were beaten and threatened up in the county attorney's office by the officers and that you finally answered the questions they wanted you to answer?

A. I said I was forced to answer the questions they wanted me to answer.

Q. Did they tell you what you should say?

A. Yes.

Q. And you said you confessed what they told you to say, is that true?

A. What they made me say and told me to say.

Q. Did you tell them then that you shot Mr. Rogers and Mrs. Rogers?

A. No, I didn't tell them that.

Q. What did you tell them?

A. I answered the question that they forced me to answer.

Q. What did you say in answer to the question?

A. In answer to which question?

Q. Did they ask you if you shot Mr. and Mrs. Rogers?

A. No, he said I shot Mr. and Mrs. Rogers.

Q. He said you did?

A. Yes, sir.

Q. Did you then admit that you did?

A. I didn't admit of anything, of my free will. I admitted by force.

Q. And you admitted at that time in your confession that you shot Mr. and Mrs. Rogers?

[fol. 383] A. Say that again.

Q. You said then, at that time, in your confession, that you shot Mr. and Mrs. Rogers?

A. Where was that at?

Q. In the county attorney's office is the time I am asking you about.

A. No, I didn't say so.

Q. What?

A. I didn't say I shot them.

Q. Well, what did you say?

A. I said I was forced to answer the questions that they asked me.

Q. What question did they ask you?

A. Well, I don't know all the questions they asked me, and I can't remember them.

Q. Did they tell you what you should say about the killing of Mr. and Mrs. Rogers?

A. I don't understand your question.

Q. Did they tell you what you should say about the killing of Mr. and Mrs. Rogers?

A. They told me that I killed Mr. and Mrs. Rogers, and that I was going to say it, that I was going to admit to it.

Q. Who told you that you shot Mr. and Mrs. Rogers and that you were going to admit to it?

A. Mr. Cheatwood.

Q. Did you then admit that you shot Mr. and Mrs. Rogers?

A. I didn't admit it with my own free will.

Q. Did you admit it?

A. I answered the question that they asked me because I was forced to.

Q. Did you admit it?

[fol. 384] By Mr. Belden: Court please, we think he has answered the question over and over, and he said he answered the questions that they asked him.

By the Court: He can say whether he did or did not. He could say yes or no. If he did admit it he can say yes, and he says he did not admit it of his own free will.

By Mr. Belden: He has answered the question, your Honor.

Q. Will you answer my question?

A. I have already answered your question.

Q. You have never answered it yet.

A. No.

Q. You did not?

A. No.

Q. You denied all the time that you had shot them?

A. I denied that I had shot them.

Q. What did you say as to who shot them?

A. I never said anybody shot them.

Q. You signed a confession, didn't you?

A. I signed after they brought me to jail.

By Mr. Belden: If the Court, the Court has suppressed the confession from the county attorney's office, the original is not there and is suppressed.

By Mr. Lattimore: That is before the defendant on the stand.

By Mr. Belden: As the confession is suppressed, certainly the Court made that ruling.

By the Court: That first confession which was obtained in the county attorney's office was by the Court suppressed and is not admissible in evidence, and things contained in the confession could not be offered.

By Mr. Lattimore: Since that ruling of the Court, at a [fol. 385] time when we had never offered the confession taken in the county attorney's office, the situation has changed entirely. The State never had offered, at any time, to prove that the defendant made any confession in the county attorney's office. In the case of the witnesses whom the State put on the stand with reference to the shells and the axe, we never asked those witnesses whether the defendant had made a confession in the county attorney's office. On cross-examination, counsel for the defendant went out of his way to go ahead and ask the witnesses about what happened in the county attorney's office. It was not proper cross-examination, but we did not care, we let it go. They asked about what happened in the county attorney's office, and they, themselves, brought out the fact that the defendant had made a confession in the county attorney's office. Certainly, in view of that fact, and the fact that they have had the defendant get on the stand and testify that he was forced and compelled to make a confession in the county attorney's office, the State has a right now as a part of its cross-examination and impeachment of him to show what that confession was, not as a part of its case in chief, but as a part of its cross examination and impeachment of the defendant, if in that confession he made statements contrary to what he is making now, and different from the confession he made at McAlester, we are entitled to show it.

By the Court: The Court permitted the defendant to submit evidence of the confession made in the county attorney's office, which the Court suppressed from the hearing of the jury, in order that it might be established, if they could

be the evidence, a continuation of fear, at the time he made the confession in the county attorney's office by having had the pan of bones set on his lap, in which the officer said it made the defendant quiver. If they would show a continuation of that fear at the time the confession was made at McAlester, then certainly the jury would have a right to [fol. 386] consider those facts to see if in there that night the confession at McAlester was made through fear or not. This Court suppressed the first confession that was made here. There was no evidence at that time of fear having been used, or force having been used in the office of the warden of the State penitentiary, and the Court was of the opinion that that confession should be submitted to the jury for its consideration. When the Court admits a confession of any kind it means certainly that the Court must admit every defense that the defendant has to offer when the Court puts his confession before the jury, as to why he made that confession. I don't know what part of this confession that was made down here, when the defendant says he was scared, and was afraid, and the Court found that there were things done there that were calculated to scare a man, make him afraid, one of his tribe, by placing the bones of dead white people in his lap, that had been murdered in the community, was calculated to arouse suspicions, things that would make him testify against himself when otherwise he would not. I think in all fairness to this defendant, he has a right to have all the defenses that he might have to the confession that was made at McAlester submitted to the jury, to have twelve men pass on it. This testimony of all the officers and the testimony of this defendant should be considered by them.

By Mr. Lattimore: No question about that. We never made any objection to their going into that. They were entitled to go into it. If the defendant was coerced and forced to make a confession, or if he even claims he was, he is entitled to have any evidence to establish that to go to the jury, that the jury may consider it and pass on the weight to be given to the confession. That is undoubtedly the law. But if the defendant, after saying that in the county attorney's office he was forced by the officers to admit what they told him to admit, if incidentally that confession would show that at that time he said that Van Bizzell did the shooting, certainly the State ought to be entitled to use that [fol. 387] for impeachment.

By the Court: I don't think you should ~~cross~~-examine him on the statement that the Court has ruled out that he admitted under fear. That will be the ruling of the Court. Exception allowed.

By Mr. Lattimore: We don't care about the exception for the State has no appeal.

By Mr. Marshall: At this time, for the purpose of the record, we make objection to the statement made by the Assistant Attorney General in the presence of the jury, that this witness stated or admitted that anyone else committed this crime in the county attorney's office, and may the jury be withdrawn and a mistrial declared. It is prejudice to the defendant to make the statement in the presence of the jury.

By the Court: Overruled, exception allowed.

By Mr. Horton: They brought that out on their examination. Certainly we ought to be able to cross-examine.

By the Court: They were permitted to bring it out for this purpose: They contended that the defendant was still scared when he went to Oklahoma City. The Court was of the opinion that several days had elapsed. *At* the time, it was not made clear to the Court that both confessions were made on the same day, as I get it now.

By Mr. Horton: But we should be allowed to prove the contrary.

By the Court: Yes, you may prove that it was not made the same day.

By Mr. Horton: And the conduct of the defendant, to show that he was not afraid, as he claims now.

By Mr. Belden: The County Attorneys says to show whether or not he was in fear. The State's own admissions were such that this Court has found that it should be suppressed, and the Court found that things had been done through the State by their own admissions that it should [fol. 388] not be admitted. Your Honor is right to say that you would permit us to show what did take place, to show whether or not the same things which produced or caused him to confess in the county attorney's office, if that same fear carried through to the making of the next confession, and we did go into that for that purpose. When the Court suppressed that testimony, they have no right to go in and ask what questions he answered yes and no.

By the Court: I don't think there should be any reference made whatever to that, only the treatment

that the defendant claims he received at the hands of these people. I will let the State on cross-examination or rebuttal go into that whole thing as thoroughly as the defendant did this morning in rebuttal to that testimony, that he did not receive beating, that he did not receive the treatment he claims, to submit it to the jury, to show that he wasn't scared when he was carried to Oklahoma City. I permitted the other side to go into that to show that he was scared. I mean McAlester. I think the same right should go to one party as goes to the other one. I permitted the defense to show the treatment they claimed the boy received from the officers from the time they took him into custody until he landed at McAlester where the last confession was made. He said he was scared. I will permit the State to go into that to show that he didn't receive the treatment he claims, and that when he got to McAlester they did not put him in or near the death cell.

By Mr. Horton: If that confession itself—it constitutes evidence itself that he was not acting under compulsion, still we couldn't use it as rebuttal unless we lay the predicate by questioning him.

By Mr. Marshall: As I understand, your ruling is that this confession is out, for rebuttal or any other reason.

By the Court: The confession is out. It is suppressed [fol. 389] from the jury, the first one. But the defendant contends that the treatment he received that led to the other confession, which we have admitted, to clarify matters, which was when he was carried to McAlester where another confession was made, which is admitted, whether or not that was true or false, the defendant said that he made this confession while he was scared, and the Court permitted him to go into the first preliminary propositions and until he was carried to McAlester, to let you consider whether or not he was scared. I am for the State to go into all matters from the time he was taken into custody until he signed the confession we are admitting, to show that he had no reason to be scared and was not scared. That is as far as I can go into it.

Q. You say it was about two thirty in the morning in the county attorney's office that the pan of bones was placed in your lap?

A. That is right.

Q. And that it was about four thirty when you finally said what the officers wanted you to say?

A. That is right.

Q. Who told you to say that it was about two thirty and about four thirty?

A. Nobody told me.

Q. You had no watch, no clock in the county attorney's office did you?

A. I know it wasn't long before daylight. I sat up until daylight.

Q. If you were beaten and tortured as you claim, did you keep any account of the time?

A. I kept account of the time from what they were saying.

Q. You were taken up to McAlester, and you made a confession in the presence of Mr. Dunn there in answer to his questions, didn't you?

A. I was forced to answer the questions that they demanded in their presence.

[fol. 390] Q. Did you make this statement?

A. Yes.

Q. You say you were beaten in the warden's office?

A. Yes.

Q. You say you were beaten for about an hour and a half?

A. That is right.

Q. And that you had been there about two hours under questioning before they began to beat you?

A. That is right.

Q. And it was about what time of night when you made this statement?

A. I didn't have any watch. I was guessing at the time.

Q. Well about what time was it?

A. I say about eleven or eleven thirty.

Q. Then can you explain why this confession which you signed and on which you put your thumb print and swore to before the chaplain of the penitentiary, Mr. Seal, shows it was made at eight fifteen in the evening?

A. Who said eight fifteen in the evening?

Q. Will you explain how it happens that this confession shows it was made at eight fifteen?

A. I told you I didn't have no watch. I don't know the exact time the confession was made. I am guessing at the time.

Q. You are guessing at it?

A. Yes sir.

Q. And you still guess it was eleven or eleven thirty?

A. Yes, when the statement was made.

Q. Did Mr. Dunn, or Mr. Raulston, or Mr. Marshall tell you what answers you should make to these questions?

A. Mr. Dunn and Mr. Van Raulston. Mr. Van Raulston forced me to answer all those questions.

[fol. 391] Q. Did Mr. Van Raulston or anybody else tell you what answers you should make to these questions?

A. Wasn't but one answer to answer to keep from being tortured any more, and that was yes.

Q. You didn't simply answer yes all through this examination of several pages, eleven pages, did you? You didn't simply answer yes all the time, did you?

A. I don't know what all is in the confession.

Q. Did anybody tell you to say in answer to the questions as to how many times you had been by Rogers' say, "I went back and forth by his house several times?"

A. No sir.

Q. Did anybody tell you to say in answer to the question, "Did you see Van Bizzell on Saturday or Sunday evening before New Years," did anybody tell you to say, "Yes, I saw him at Fort Towson?"

A. I didn't say that at all.

Q. Did anybody tell you to say in answer to the question as to what was your conversation with Van Bizzell, tell you to answer "He asked me if I had a gun and I told him no"? Did anybody tell you to say that?

A. I ain't never heard that before.

Q. Did anybody tell you to state in answer to the question, "Then what else was said? He told me if I had a gun that he knew where we would make some money"? Did anybody tell you to answer that way?

A. I didn't say that.

Q. Did anybody tell you in answer to the question, "Then what did you say," did you say, "I told him I could get one"?

A. I didn't say that.

Q. Then the answer to the next one, "What else was [fol. 392] said," did anybody tell you to say, "He told me to get it and meet him"?

A. I didn't say that.

Q. And in answer to the question, "To meet him where," did anybody tell you to say, "To start up the branch from Fort Towson"? Did anybody tell you to say that?

A. I didn't say that.

Q. Did anybody tell you to say in answer to the question, "You knew who you were going to rob, that you were going to rob a man by the name of Rogers, a white man that Saturday evening——"

A. I didn't say that.

Q. Did anybody tell you to say "Yes, sir"?

A. I didn't say that.

Q. Did anybody tell you to say in answer to the question, "What time did you agree to meet him," "About dusk on Sunday evening, December 31, 1939"? Did anybody tell you to say that?

A. I didn't say that.

Q. Did anybody tell you to say in answer to a question as to when you went back to Bus Fleeks' and got the gun, to answer "About three thirty in the afternoon?"

A. I didn't say that.

Q. And then in answer to the question, "Where did you carry it to," did anybody tell you to say, "Went over to the cafe and then back in the edge of the woods"?

A. I didn't say that.

Q. And in answer to the next question, "Did you meet this other boy like you agreed to meet him," did anybody tell you to say, "Yes, sir" to that question?

A. I didn't say that.

Q. In answer to the question, "How long did you wait on him," "About 20 minutes," did anybody tell you to say that?

[fol. 393] A. I didn't say that.

Q. Did anybody tell you to say in answer to the question, "Did you go right direct from there to this house," Answer "Yes sir"?

A. I didn't say that.

Q. Anybody in answer to the question, "You both walked up there," did anybody tell you to say "Yes, sir" to that?

A. I didn't say that.

Q. Did anybody tell you in answer to "Where did you go when you got there," did anybody tell you to say, "To the east window"?

A. I didn't say that.

Q. Then in answer to the question, "Was there a light in the house," did anybody tell you to say, "Yes sir"?

A. I didn't say that.

Q. In answer to the question, "Did you look in at the window," did anybody tell you to say "Yes sir"?

A. I didn't say that.

Q. "You and this other boy, Vanzell, together"? "Yes sir."

A. I didn't say that.

Q. In answer to the question, "Who did you see in there," did you answer: "His wife. When we first looked in there we didn't see him but we saw his wife and little baby?"

A. I didn't say that.

Q. Did anybody tell you to say in answer to the question, "How long did you stand at the window," "About 20 minutes, I guess?"

A. I didn't say that.

Q. Question, "How long did she stay so you could see her?" Answer, "She was sitting on the floor by the heater on the other side of him."

A. I didn't say that.

[fol. 394] Q. Question, "Where was he?" "He was sitting beside the wall on the floor and we couldn't see him."

A. I didn't say that.

Q. Question, "Did you see the boy?" "Yes sir."

A. I didn't say that.

Q. Question, "Did you see her take the baby and put it to bed?" "No, sir, I didn't see her put it in the bed."

A. I didn't say that.

Q. Question, "Where did you go to?" "No place."

A. I didn't say that.

Q. "Where did you go to?" "No place."

A. I didn't say that.

Q. Question, "Where did she go with the baby?" "She gave the little baby to him and made up the bed." Did you say that?

A. I didn't say that.

Q. Question, "Then what happened?" Did you answer, "Then he got up to go to bed"?

A. I didn't say that.

Q. Question, "Did you see her put the little baby in the bed?" Answer, "I didn't see her put him in bed."

A. I didn't say that.

Q. Question, "Did you see her take the little baby out of his arms?" Answer: "Yes sir."

A. I didn't say that.

Q. Question, "And he got up and pulled off his clothes?"
 "Yes, sir."

A. I didn't say that.

Q. Question, "Did you see him then?" Answer "Yes, sir."

A. I didn't say that.

[fol. 395] Q. Question, "What did you do?" Answer, "I shot him then as he pulled his clothes off. When he got up from the side of the wall to pull his clothes off, I shot him."

A. I didn't say that.

Q. Question, "Was the bed close to the window?" Answer "No, sir."

A. I didn't say that.

Q. Question, "Had the light been blown out?" Answer, "No, sir."

A. I didn't say that.

Q. Question, "Did he get his pants off?" Answer, "Yes sir."

A. I didn't say that.

Q. Question, "Then you shot him?" Answer, "Yes, sir."

A. I didn't say that.

Q. Question, "Where was this other negro, Vanzell?" Answer, "He was standing in front."

A. I didn't say that.

Q. Question, "What kind of a gun did you have?" Answer, "12 gauge shot gun."

A. Yes sir.

Q. You answered that?

A. Yes sir.

Q. Question, "What kind of shells?" Answer, "No 4."

A. That is right.

Q. Question, "He was over close to the bed when you shot him?" Answer. "He was over close to the window."

A. I didn't say that.

Q. Question, "How far was he from the window when you fired the shot?" "He was about three feet from the window."

A. I didn't say that.

[fol. 396] Q. Didn't you, in Mr. Dunn's office, get up and go over and show him where Rogers was standing about three feet with his left side to the window? Did you do that?

A. No sir.

Q. Question, "How close did you have the barrel of the gun to the window when you fired?" Answer, "About two feet from the window."

A. I didn't say that.

Q. Question, "You were standing on the outside on the ground?" Answer, "Yes, sir."

A. I didn't say that.

Q. "How was he standing?" Answer, "Standing sideways to me."

A. I didn't say that.

Q. "Do you remember what side you shot him in?" Answer, "In the left side."

A. I didn't say that.

Q. Question, "How high up did you shoot him?" Answer, "About in the side."

A. I didn't say that.

Q. Question, "You aimed to shoot him in the heart?" Answer, "No."

A. I didn't say that.

Q. Question, "You just shot him in the left side?" Answer, "Yes, sir."

A. I didn't say that.

Q. Question, "Did he fall?" Answer, "Yes, he fell."

A. I didn't say that.

Q. Question "Into the floor?" Answer, "Yes, sir."

A. I didn't say that.

Q. Then what did you and this other negro, Vanzell, do?"

[fol. 397] Answer, "Waited until the woman came out."

A. I didn't say that.

A. No, question, "Waited until the woman came out?" Answer, Yes, waited until the woman came out."

A. I didn't say that.

Q. Question, "Did you stand right there?" Answer, "Yes."

A. I didn't say that.

Q. Question, "Did you hear the woman hollering in the house?" Answer, "She didn't holler."

A. I didn't say that.

Question, "She came running out hollering for help?" Answer, "The little boy and baby hollered."

A. I didn't say that.

Q. Question, "What did she say?" Answer, "She didn't holler."

A. I didn't say that.

Question, "When she came out, did you see her as she came out the door?" Answer, "Yes, as she came out the door."

A. I didn't say that.

Q. Question, "Then what? Answer, "She came out of the house and came around the house to the back."

A. I didn't say that.

Q. Question, "Did you go both of you to meet her? Answer, "Yes, sir."

A. I didn't say that.

Q. Question, "Were you facing her when you shot her?" Answer, "Yes, sir."

A. I didn't say that.

Q. Question, "Did she see you before you shot when she came out?" Answer, "Yes sir."

A. I didn't say that.

[fol. 398] Q. "What did she do?" Answer, "She started to run."

A. I didn't say that.

Q. Question, "Was she running when she came around the house?" Answer, "Yes."

A. I didn't say it.

Q. Question, "Was you running around?" Answer, "I walked around, I didn't have far to go."

A. I didn't say that.

Q. Question, "Were you at the corner of the house?" Answer, "Yes, sir."

A. I didn't say it.

Q. Question, "She didn't have a chance to see you?" Answer, "Yes, she was by the house, there."

A. I didn't say that.

Q. Question, "Did she turn around?" Answer, "No she stood there."

A. I didn't say that.

Q. Question, "Where did you shoot her?" Answer, "In the stomach."

A. I didn't say that.

Question, "Her facing you?" Answer, "Yes, sir."

A. I didn't say it.

Q. Question, "How far was she from you?" Answer, "About twelve feet."

A. I didn't say that.

Q. Question, "She fell?" Answer, "Yes sir."

A. I didn't say that.

Q. Question, "Did you have any more shells." Answer, "Yes sir."

A. I didn't say it.

Q. Question, "How many?" Answer, "Five shells."

[fol. 399] A. I didn't say that.

Q. Question, "Did you reload your gun again?" Answer, "Yes, I did."

A. I didn't say that.

Q. Question, "Was it a pump or automatic?" Answer, "A single barrel."

A. I didn't say that.

Q. Question, "You stopped and loaded your gun again?" Answer, "Yes, sir."

A. I didn't say that.

Q. Question, "She fell?" Answer, "Yes sir."

A. I didn't say that.

Q. Question, "What did she say when she fell?" Answer, "She hollered and fell."

A. I didn't say that.

Q. Question, "What was she saying when you got the axe?" Answer, "She was sniffing and crying."

A. I didn't say that.

Q. Question, "Did you or the other boy, Vanzell, hit her with the axe?" Answer, "He, Vanzell, hit her."

A. I didn't say that.

Q. Question, "Where did you get it?" Answer, "Out at the wood pile."

A. I didn't say that.

Q. Question, "Where did you get that axe?" Answer, "He, Vanzell, had it before she came back around there."

A. I didn't say that.

Q. Question, "Where was the wood pile?" Answer, "It was northeast of the house."

A. I didn't say that.

[fol. 400] Q. Question, "Are you right sure that he used the axe?" Answer, "Yes, sir."

A. I didn't say it.

Q. Question, "How many times did he hit her?" Answer, "Three times."

A. I didn't say that.

Q. Question, "Did you see it?" Answer, "Yes, sir."

A. I didn't say that.

Q. Question, "You were standing right there?" Answer, "Yes sir."

A. I didn't say that.

Q. Question, "Did one or both of you put her on the porch?" Answer, "We both dragged her up, one on each side of her, a hold of her arms and sides."

A. I didn't say that.

Q. Question, "You got one arm and he the other?" Answer, "Yes, sir."

A. I didn't say that.

Q. Question, "How close to the porch did you put her?" Answer, "About middle way on the porch, close like to the house."

A. I didn't say that.

Q. Question, "Was she dead then?" Answer, "Yes, sir."

A. I didn't say that.

Q. Question, "What did you then do?" Answer, "Went in the house."

A. I didn't say it.

Q. Question, "From the front or back?" Answer, "Front."

A. I didn't say it.

Q. Question, "What did you then do?" Answer, "Searched his clothes."

A. I didn't say that.

[fol. 401] Q. Question, "Where was he?" Answer, "Laying on the floor."

A. I didn't say that.

Q. Question, "Did you see anyone else in the house?" Answer, "No, I didn't."

A. I didn't say it.

Q. Question, "How long were you in the house searching?" Answer, "About five minutes."

A. I didn't say it.

Q. Question, "How much money was he supposed to have?" Answer, "The other fellow told me about one hundred dollars."

A. I didn't say that.

Q. Question, "Did he tell you where he got this money?" Answer, "Been gambling out there somewhere."

A. I didn't say that.

Q. Question, "Then after you searched his clothes where else did you search?" Answer, "In the dresser."

Q. I didn't say that.

Q. Question, "Where else?" Answer, "That is all."

A. I didn't say that.

Q. Question, "Then what happened?" Answer, "We set the house on fire, then."

A. I didn't say that.

Q. Question, "How did you set it on fire?" Answer, "Put coal oil on it."

A. I didn't say that.

Q. Question, "Which one picked up the lamp?" Answer, "He picked it up and blowed the light out."

A. I didn't say that.

Q. Question, "You still had the gun in your hand?" Answer, "Yes sir."

[fol. 402] A. I didn't say that.

Q. Question, "You still had your gun when he picked the axe up?" Answer, "Yes."

A. I didn't say that.

Q. Question, "You reloaded the gun so that if anyone else should come out you would have killed them too?" Answer, "Yes sir."

A. I didn't say that.

Q. Question, "After you poured the coal oil on the floor, what happened?" Answer, "Poured it on the paper on the side of the wall."

A. I didn't say that.

Q. Question, "How many matches did you strike?" Answer, "One match."

A. I didn't say that.

Q. Question, "How many did he strike?" Answer, "He struck three or four."

A. I didn't say that.

Q. Question, "How many matches did you strike?" Answer, "I struck three or four but only one match set it."

A. I didn't say it.

Q. Question, "How many places did you set the house on fire?" Answer, "I set it on the kitchen with those other matches."

A. I didn't say that.

Q. Question, "How many matches did you strike to set the house on fire?" Answer, "I just struck some searching it."

A. I didn't say it.

Q. Question, "He poured the coal oil on and you set it on fire?" Answer, "Yes sir."

A. I didn't say it.

Q. Question, "Where did you go then?" Answer, "Home."

A. I didn't say that.

[fol. 403] Q. Question, "What did you do with the gun?" Answer, "Took it home with me."

A. I didn't say that.

Q. Question, "What time did you get home?" Answer, "About eight thirty I guess."

A. I didn't say it.

Q. Question, "Did you go to bed?" Answer, "Yes, sir."

A. I didn't say that.

Q. Question, "Did you sleep?" Answer, "yes."

A. I didn't say that.

Q. Question, "What did you do the next morning?" Answer, "Went to town and came back and went hunting."

A. Say that again.

Q. "What did you do the next morning?" "Went to town and came back and went hunting."

A. That is what I did Monday morning.

Q. On Monday morning?

A. Yes sir.

Q. Question, "With the same gun?" Answer, "Yes."

A. I didn't say that.

Q. Question, "What did you do with the gun?" Answer, "He came and got it."

A. I didn't say that.

Q. Question, "Where did you buy the shells?" Answer, "W. A. Hall store."

A. That is where I bought the shells I had.

Q. Is that the answer that you gave Mr. Dunn?

A. Yes sir.

Q. Question, "How much did you give for them?" Answer, "A quarter."

A. That is right.

[fol. 404] Q. Question, "Where did you go after he came and got the gun?" Answer, "I come on back home to Hugo."

A. I didn't say that.

Q. Question, "Did you ever see this other negro, Vanzell, any more?" Answer, "I saw him in jail."

A. I seen him in jail.

Q. Did you answer Mr. Dunn's question that way?

A. I said I seen him in jail.

Q. Is that your correct answer to Mr. Dunn's question?

A. I don't know.

Q. Question, "Did you talk about this case?" Answer, "Yes, in Fort Towson."

A. I didn't say that.

Q. Question, "You both agreed not to tell it?" Answer, "Yes sir."

A. I didn't say that.

Q. Question, "Is this statement you have made true?" Answer, "Yes, sir."

A. I didn't say that.

Q. Question, "This was made of your own free will and accord?" Answer, "Yes sir."

A. I didn't say that.

Q. Question, "Any threats been made on you?" Answer, "No, sir."

A. I didn't say that.

Q. Question, "Any promise of reward or leniency been made?" Answer, "No, sir."

A. I didn't say that.

Q. Question, "This statement and confession has been made by you voluntarily?" Answer, "Yes, sir."

A. I didn't say that.

Q. Question, "You have absolutely told me the truth?" [fol. 405] Answer, "Yes, sir, I have."

A. I didn't say that.

Q. And before you made your statement, when you first went into the office of Mr. Dunn, he asked you if you had told me truth down here at Hugo and you told him that you had not, didn't you?

A. I don't remember him asking me that question.

Q. Didn't he ask you that and you made the answer that you hadn't told the truth, and if he didn't ask you if you wanted to tell the truth now?

A. No.

By Mr. Marshall: He is asking a double question, if he did this, and then if he did not do that. I think there should be one question at a time.

By the Court: Ask him again.

Q. Didn't he ask if you wanted to tell the truth, and you said yes.

A. I didn't say that.

Q. Was what you told the warden over there at McAlester as to this crime true?

A. What the warden asked me and what they forced me to answer was not the truth.

Q. You say that these answers that I read, many of them, were not what you said?

A. I can't remember all the questions they asked me.

Q. On this Monday morning after the fire, when you took this single barrel shot gun and went hunting, where did you go?

A. I went in Mr. Hooks' pasture.

Q. Whose pasture?

A. Mr. Hooks.

[fol. 406] Q. Where is that pasture?

A. That is south of town.

Q. And that Monday you were hunting without a license in spite of the fact that it is true that many officers were down in that section trying to find out about the crime?

A. I didn't know who was trying to find out about the crime.

Q. Wasn't there many officers down there trying to find out about this crime?

A. I don't know.

Q. You knew that the house had burned and that Mr. and Mrs. Rogers had been killed and burned and the four year old child had been burned, didn't you?

A. No sir.

Q. You didn't know that on the Monday when you went out there?

A. I knew that the house had been burned. I didn't know who was killed in the house.

Q. You knew that some people had been killed in the house, didn't you.

A. I heard that some people had been killed.

Q. And that was before you went out?

A. Yes sir.

Q. What were you hunting that day?

A. Rabbits.

Q. It was on Sunday then that you were over in the direction of the Rogers home?

A. Yes sir, it was on Sunday.

Q. And that is when you shot at the rabbit?

A. That is right.

Q. You shot at him once with the shot gun and he never moved?

A. That is right.

Q. And you reloaded the single barrel shot gun and the [fol. 407] rabbit still sat there?

A. That is right.

Q. And the rabbit ran and you shot at him again?

A. Yes sir.

Q. What did you do with the shells?

A. Just dropped them on the ground.

Q. And you say they were a yard apart?

A. That is right.

Q. Did you look to see where they were?

A. No sir.

Q. How did you know they were about a yard apart?

A. When I showed the officers the shells I picked them up myself and they were about a yard apart.

Q. Referring back to this confession made over at Mc-Alester, you say you did not make a large number of the answers in the confession. Can you explain why in the answers that appear in this confession, and which you deny, will you explain how the officers should have put in those answers things that nobody but the murderer could have possibly known?

By Mr. Marshall: We object to the question to ask why certain statements appear. I don't see how in the world he could say. It is purely argument.

By the Court: That would call for his conclusion. He might answer if he knows.

A. I didn't write the statement and I don't know why they are in there.

Q. It was read over to you after the chaplain came in, wasn't it?

A. I didn't hear it.

Q. You didn't hear it? Didn't the chaplain then ask you if that statement was the truth?

[fol. 408] A. The chaplain never said a word to me.

Q. Didn't you tell the chaplain that the statements in that confession were the truth?

A. No sir.

Q. Didn't you swear to those statements before the chaplain?

A. No sir.

Q. You didn't? You shot Mr. Rogers, didn't you?

A. No sir.

Q. And Mrs. Rogers, didn't you?

A. No sir.

Q. And set the house on fire after pouring coal oil on it, didn't you?

A. No sir.

Q. And let that little four year old child burn to death?

A. No sir.

Q. That is all.

Witness Excused.

ELLA MAY FLEEKES, in behalf of the defendant in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Belden:

Q: Your name is Ella May Fleekes?

A. Yes sir.

Q. Are you related to W. D. Lyons, the defendant?

A. Yes sir.

Q. What is the relation?

A. Sister.

[fol. 409] Q. Do you remember about the time when W. D. was arrested?

A. No sir.

Q. Well, after he was arrested, did you visit him up in the jail?

A. Yes sir.

Q. Well, tell the Court and jury whether or not you observed anything unusual about him?

A. Well, he was bruised up a lot, his eye was bruised.

Q. Which eye? Do you know?

A. No sir. And his arm and his back.

Q. His eye, and arms and back?

A. Yes sir, and he said his leg was bruised, but we didn't look at it.

Q. You did look at his back and arms and eye?

A. Yes sir.

Q. You say they were bruised?

A. Yes sir.

Q. How could you tell they were?

A. There were black spots on them.

Q. How about the eye?

A. That was the same way.

Q. Describe it.

A. His eye was black and his arms, was knots on the arms, and bruises and spots all over his back and arms.

Q. Was he in the men's quarters or women's quarters?

A. I don't know the difference.

Q. In the north or south part of the jail?

A. South.

Q. Did he walk about any while you were there?

A. Yes sir, he walked about. He held to me and his wife.

Q. How?

[fol. 410] A. He put his arm around our shoulders.

Q. And walked that way?

A. Yes sir.

Q. Is that natural for him to walk that way?

A. No sir.

Q. Did he walk that way before he was arrested?

A. No sir.

Cross-examination.

By Mr. Lattimore:

Q. Did he tell you how he got those bruises?

A. No sir.

Q. Did you ask him?

A. No sir.

Witness excused:

CHRISTINE JAMES, in behalf of the defendant in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Belden:

Q. State your name, please.

A. Christine James.

Q. Christine, were you up in the jail at any time while W. D. Lyons, the defendant, was up there?

A. Yes sir, I was.

Q. Was he in the women's quarters a part of the time?

A. No sir, he wasn't in there with us. He was in there with the men.

Q. Did you see him at any time during that time?

A. I seen him when they brought him up.

[fol. 411] Q. Tell the Court and jury if you saw anything unusual.

A. I didn't see anything.

Q. Did you notice his head, face, or eye?

A. No sir, I didn't pay any attention to him.

Q. You didn't pay any attention to him?

A. No sir.

Q. You were in jail at that time?

A. Yes sir.

Q. And now you say you didn't observe anything about his eye?

A. I didn't pay any attention to him.

Q. You didn't? My question was you didn't observe anything about his eye?

A. No sir, I never paid any attention to him.

Witness excused.

MRS. VERNON COLCLASURE, in behalf of the defendant in-chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Belden:

Q. Will you state your name, please?

A. Mrs. Vernon Colclasure.

Q. Where do you live, Mrs. Colclasure?

A. Fort Towsen, Oklahoma.

Q. How long have you lived there?

A. About 28 years.

Q. Mrs. Colclasure, were you related to Mrs. Rogers, Elmer Rogers' wife?

A. Yes sir.

[fol. 412] Q. What relation was it?

A. Sister-in-law by marriage.

Q. You married—

A. I married her brother.

Q. This little boy, James, that testified is your nephew?

A. Yes sir.

Q. The night that the house burned, did James come to your home?

A. Yes, he did.

Q. Was that the first place he went to as far as you know?

A. Yes sir.

Q. Did he tell you who it was that had killed his mother and father?

By Mr. Lattimore: To which we object as incompetent, irrelevant and immaterial, and hearsay.

By the Court: Sustained.

Q. All right. Do you know Vernon Cheatwood, the Governor's special investigator?

A. Yes, I do.

Q. Do you recall him coming to your home one morning, and there talking to you and to the father of Mrs. Rogers about a confession he had obtained:

A. Yes, he did.

Q. All right. Now, about what time of the morning was that, Mrs. Colclasure?

A. About eight o'clock.

Q. What was the first you knew of anyone being there?

A. My father-in-law went to the door. He was right at the door, and he went to the door.

Q. And opened the door?

A. Yes sir.

Q. Who was there?

[fol. 413] A. Vernon Cheatwood.

Q. Did he come in?

A. My father-in-law brought him into the room where I was. There was a fire there.

Q. What did Mr. Cheatwood do or say, if anything?

By Mr. Lattimore: Objected to as incompetent, irrelevant and immaterial, and calling for hearsay testimony.

By Mr. Marshall: If the Court please, on yesterday we specifically asked Mr. Cheatwood whether or not he made a statement concerning a blackjack, and he answered that he never had made the statement concerning that, and I think

we are in a position at this time to show that he did make the statement.

By Mr. Belden: And further, he stated at that time that he never had a blackjack.

By Mr. Lattimore: I don't know what the law is in New York, but in Oklahoma in order to impeach you must ask an impeaching question, fixing the time and place. They asked general questions. I was watching to see what basis they would lay. They asked general questions and cannot come in on this procedure now.

By the Court: You may fix the time and place.

By Mr. Lattimore: I understand. They must in the question they ask the witness whom they intend to impeach, fix the time and place. They cannot ask a witness on the stand if he made any statement to such and such effect and on the basis of that general question, such as they asked these various witnesses, prove at some particular time and place that he made contradictory statements. That is a settled law in this State. In order to do that, you must call the attention of the witness to the person, time and place, when you intend to show he made that statement. We have decisions to that effect.

[fol. 414] By Mr. Belden: Here is an officer of the State who testified definitely that he never had a blackjack at any time in his possession, and he was asked the specific question if he did not have it down at the hotel lobby and show it to people, and to other people besides that, and he said positively that he did not, and did not have a blackjack, and we want to show that he did have a blackjack in this county and about a year ago, and we think it is competent.

By Mr. Lattimore: You ought to know that you can't do that with a question like this one he is asking the woman on the stand, what a witness for the State did and said.

By the Court: I don't remember just how that evidence was brought out from the witness on the stand.

By Mr. Belden: Court please, I will withdraw that question.

By Mr. Lattimore: It is perfectly true now that it would be admissible for them to show that the State's witness had a blackjack, but they have not laid a basis for any testimony as to what he said to anyone. You have to fix the time and place and the person to whom the statement was made in order to call the witness' attention to it.

By the Court: I will sustain the objection. Let the record show that the defendant is permitted to call Mr. Cheatwood for further cross-examination.

[fol. 415] VERNON CHEATWOOD, recalled by the defendant in chief for further cross-examination, testified as follows, to-wit:

Recross-examination.

By Mr. Marshall:

Q. You have already been sworn?

A. I was sworn yesterday.

Q. Directing your attention to the morning that the statement was procured from W. D. Lyons in the county prosecuting attorney's office, are you familiar with that morning?

A. Do you mean the time of the day?

Q. That date?

A. Yes, I think it was on the 23rd day of January.

Q. On that same day, directing your attention to some time in the forenoon, just around noon, between the hours of eleven and possibly one o'clock, were you in the Webb Hotel in this city?

A. I don't remember being in the Webb. I was around the court house most of that time.

Q. Did you go to the hotel?

A. I did and checked out and went to Oklahoma City some time in the afternoon.

Q. Do you remember some time about noon, about eleven o'clock, in the lobby of the hotel, telling the porter—do you know that porter?

A. I don't know any of them by name.

Q. Do you know him when you see him?

A. I told you I didn't know their names.

Q. You would know him if you should see him?

A. Yes.

[fol. 416] Q. Did you tell the porter to go up stairs and get your nigger beater?

A. I didn't.

Q. Did you tell the porter to go up stairs and get anything for you that morning?

A. I don't recall being at the hotel that morning. I was around the court house. Some time in the afternoon I checked out. I stayed around the court house until afternoon.

Q. How many times did you go to the hotel that day?

A. I don't recall except when I got ready to go to Oklahoma City in the afternoon.

Q. At that time when you checked out, did you tell the porter to go up stairs and get your nigger beater?

A. I never made no such statement.

Q. During that period, as you fix it in the early afternoon—

A. I am sure it was some time in the afternoon. The photographer had taken the picture some time after dinner. I hadn't been to the hotel, then, I am sure. I was around the court house.

Q. Did you have in your hand at any time in the lobby of that hotel a blackjack?

A. I don't remember having any blackjack there in my hand. I don't own one, don't have one.

Q. Do you deny having a blackjack in your hand that day?

A. I don't remember having one in my hand that day at all.

Q. You would not positively deny it?

A. I don't think I had one. I don't own one. I don't remember having one in my hand.

Q. Did you have in your hand a weapon about so long, about a foot long, between two and four inches wide, about an inch thick, leather, and a long handle on it?

A. No sir, I did not.

[fol. 417] Q. You didn't see any such instrument?

A. No sir.

Q. Did you, in the presence of the manager of the Webb Hotel—do you know the manager of the Webb?

A. I know the boys who work there. I don't know who owns it.

Q. The man behind the desk?

A. I couldn't call his name.

Q. Do you know him when you see him?

A. Yes.

Q. Did you, in his presence, did you say you beat a confession out of W. D. Lyons?

A. No, sir.

Q. Did you say you had beat a confession out of a negro?

A. No.

Q. Did you say you had beat him from feet to head with a blackjack?

A. No, I didn't make any such statement.

Q. On the same morning, do you remember the time you went with Lyons to the Rogers home, the site of the Rogers home?

A. Yes.

Q. Do you remember going by the home of Mr. Vernon Colclasure?

A. Buddie Gee and I went before this was taken to see about where the windows were in the house.

Q. Did you go in the house where Mrs. Vernon Colclasure was present?

A. I stopped at the gate and honked my horn. I could not have been gone over seven or eight minutes until I was back.

Q. I want to know if you were in the presence of Mrs. Colclasure?

A. I didn't go in the house that morning.

[fol. 418] Q. Did you see Mrs. Vernon Colclasure?

A. Not that morning.

Q. Did you, in the presence of Mrs. Vernon Colclasure, in the presence of Mrs. Vernon Colclasure and the old gentleman, did you in their presence that morning, some time around eight o'clock, make the statement to them that you had beaten a confession out of W. D. Lyons?

A. That morning?

Q. Yes sir.

A. No, and no other time.

Q. Did you say to them in the presence of Mr. Colclasure and Mrs. Colclasure, that you had beaten him with a blackjack?

A. I did not.

Q. Did you say you had beaten the negro with a blackjack?

A. No sir.

Q. Did you show them a blackjack?

A. No, I didn't have one.

Q. Did you show them a weapon of any kind?

A. I did not. I did not go in the house. I stopped at the gate and honked my horn. He said, "I will be out." I was there for a second and went on back.

Q. Did you go into the Colclasure house at all that day?

A. Not that day, I didn't.

Q. You are positive.

A. I don't remember going that day. I was there immediately after the crime happened. I don't remember being there that day.

Q. You are not positive.

A. I am sure I didn't. I came back here and stayed here all that day.

Q. On the particular day that you went in the house, do you remember what day that was?

[fol: 419] A. I went down as quick as I came, the next day, the second or third day of January, to ask who Elmer Rogers was, and try to trace the crime, and I did then.

Q. Was Lyons under arrest at that time?

A. No, nobody was under arrest for the crime.

Q. After Lyons was arrested, did you ever go into that house?

A. I don't remember whether I did or not. After he was arrested, I don't remember, I might have, I would not say whether I was or not.

Q. Do you remember talking to Mr. Skeen, the hotel clerk, the man behind the desk, last night, about this case?

A. I don't remember saying anything about it. I asked him if he was going to be a witness.

Q. What, if anything, did you say to him?

A. I don't remember saying anything to him.

Q. Did you ask him what he was going to say?

A. No, I didn't.

Q. Did you make any statement of having forgotten something in your testimony, last night in the Webb Hotel?

A. To him?

Q. Yes sir.

A. No, I did not.

Q. Speaking of last night, when you were in the lobby of the Webb Hotel talking to Mr. Skeen about whether or not he was going to be a witness in this case, as you referred to before, did you or did you not suggest that he forget something about his testimony and about what you said?

A. I sure did not.

Q. And as to what you had said in the lobby prior to that time?

A. No sir.

[fol. 420] ALBANY GIPSON, in behalf of the defendant in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Belden:

Q. What is your name?

A. Albany Gipson.

Q. Where do you live?

A. Webb Hotel.

Q. Where were you working on the 23rd of January, 1940?

A. Webb Hotel.

Q. Do you know Mr. Vernon Cheatwood, the Governor's special investigator?

A. Yes sir.

Q. Did he put up at the hotel at that time, when he was down here? That is, was he registered there?

A. I don't know, sir, whether he was registered there or not at that time.

Q. All right. I will ask you if he, that day, said to you, "Boy, go up to my room and get me my nigger beater"?

A. Yes sir.

Q. He did say that?

A. Yes sir.

Q. Did you go to his room?

A. Yes sir.

Q. What did you do?

A. I went up to his room, and I looked on the dresser, and brought down the thing he called the nigger beater.

Q. What do you usually call them?

A. I got what I seen. It was a blackjack, about that long.

Q. Was it heavy or not?

[fol. 421] A. It was a—it wasn't to say heavy, but it had weight.

Q. Do you know what we mean by a loaded blackjack?

A. Well, it was heavy on one end and shot in it.

Q. Heavy at one end?

A. Yes sir.

Q. What did you do with it?

A. I brought it down stairs to him.

Q. Where was he?

A. He was at the head of the stairs.

Q. Did you give it to him?

A. Yes sir.

Q. Did he make any statement?

A. He said, "This is what I beat the nigger boy's head with."

Q. Was anything further said then that you know of?

A. No sir.

By Mr. Lattimore:

Q. Do you remember when that happened?

A. No sir.

Witness excused.

LESLIE SKEEN, in behalf of the defendant in chief, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Belden:

Q. What is your name?

A. Leslie Skeen.

Q. Where do you live, Mr. Skeen?

A. At the Webb Hotel in Hugo.

Q. How long have you lived at the Webb Hotel in Hugo?

[fol. 422] A. I came there in August, 1938.

Q. What position do you hold at the Webb Hotel?

A. Day clerk and bookkeeper.

Q. Were you employed there January 23, 1940?

A. Yes sir.

Q. Mr. Skeen, as such day clerk and bookkeeper, do you have charge of the records and register?

A. Yes sir.

Q. Do you know Vernon Cheatwood, the Governor's special investigator?

A. Yes sir.

Q. Did he at that time register at the Webb Hotel?

A. He was there during January on two different times.

Q. During the investigation of the murder of the Rogers?

A. Yes sir.

Q. I will ask you if on the day the confession was obtained from W. D. Lyons, he had a conversation with you in the hotel lobby with reference to that confession?

A. Yes.

Q. Will you state to the jury what that was?

By Mr. Lattimore: That is not a proper question. He should ask the witness the question he asked the State witness.

Q. Did he at that time tell you of having a blackjack?

A. I don't remember what he called it.

Q. Did he describe a weapon of some kind?

A. Yes, he told me he lost it, if I found it, to be sure and give it to him.

Q. Did he describe it?

A. I asked him if it was a regular blackjack, and he said one end is, and the other end is flat.

[fol. 423] Q. One end is regular blackjack and the other end was flat?

A. Yes.

Q. Did he make a further description of it?

A. He said he used the heavy end to hit them with and he used the other end to slap them with.

Q. Did he make a statement as to using that blackjack?

By Mr. Lattimore: I have not objected but he continues to ask general questions.

By the Court: Ask him the specific question.

Q. Did he tell you of using that blackjack in obtaining this confession?

By Mr. Lattimore: He ought to know that the proper question to ask this witness is exactly the same question he asked Mr. Chentwood.

Q. Did he say he beat a confession out of Lyons?

A. No, he didn't.

Q. He didn't say that?

A. No.

Q. Did he, on last night, suggest to you that you forget what he said to you in the hotel lobby on the former occasion?

A. Yes.

Q. What did you tell him?

A. I told him I hadn't forgotten it and to me it would be telling a lie if I said I had.

Q. Did he, at that time, say, when talking about this blackjack, that he had beat a negro with it?

A. He said, "If I had had it the night before I would have got it out of him then."

Q. That if he had had it the night before he would have got it out of him then.

A. Yes.

[fol. 424] MRS. VERNON COLCLASURE, recalled in behalf of the defendant in chief, testified as follows, to-wit:

Direct examination.

By Mr. Belden:

Q. You are the same Mrs. Vernon Colclasure that — on the stand a few minutes ago?

A. Yes sir.

Q. Mrs. Colclasure, do you remember the day that they were supposed to have found the axe at the Rogers home, what had been their home?

A. That was the morning Cheatwood came to the house to get my husband to get the pick to get the axe.

Q. That was about what time in the morning?

A. About eight o'clock.

Q. Did he come into the house that morning?

A. He did.

Q. Did he take a blackjack from his overcoat pocket?

A. He certainly did.

Q. Did he there say that he had beaten the confession out of W. D. Lyons?

A. He said he beat him for—

By Mr. Lattimore: Just a minute. Answer yes or no.

Q. No, answer no or yes and then explain.

A. Yes, he did.

Q. Now you may explain.

By Mr. Lattimore: No, she can't explain unless I ask her to.

By Mr. Belden: If the Court please, I think the witness would have a right to explain.

By the Court: You may explain.

[fol. 425] By Mr. Lattimore: It is immaterial to elaborate on a conversation.

By Mr. Belden: I will withdraw the question. (Q.) Did he say at that time that he had beaten W. D. Lyons for six solid hours?

By Mr. Lattimore: We object, no predicate was laid for that question, it is going beyond the limit.

By Mr. Belden: He denied that he had ever used a blackjack on W. D. Lyons, denied that he had told anyone he had.

By the Court: I think this witness ought to have the right to tell what was said, and the Court will permit her to tell it.

By Mr. Lattimore: Not a decision in the State that will support a right to do it. The decision I called your attention to awhile ago gave the right to ask an impeaching question, and the opinion is the same, you cannot ask a witness a question that the other witness has not been asked.

By the Court: All right. You may ask the question that you asked the other witness?

Q. Did Mr. Cheatwood say that he beat W. D. Lyons from his head to his feet with that blackjack?

A. He said he beat him from his knees on down.

Witness Excused.

E. O. COLCLASURE, in behalf of the defendant in chief, after being duly sworn, testified as follows, to-wit?

Direct-examination.

By Mr. Belden:

Q. You may state your name, please.

A. Colclasure.

[fol. 426] Q. Your initials?

A. E. O.

Q. Where do you live?

A. Fort Towson at present.

Q. How long have you lived in Choctaw County?

A. This time since the middle of last February. I had lived here before.

Q. You are the father of Mrs. Elmer Rogers, who was killed and burned?

A. Yes sir.

Q. And therefore the father-in-law of Mr. Rogers?

A. Yes sir.

Q. And the grandfather of the little boy that was burned?

A. Yes sir.

Q. Mr. Colclasure, do you know Vernon Cheatwood?

A. Yes sir.

Q. State investigator?

A. Yes sir.

Q. Do you know of the day that they obtained a confession out of W. D. Lyons, this defendant?

A. Well the exact date, I don't just remember.

Q. Do you remember that day?

A. Yes.

Q. Do you remember the day they were supposed to have found the axe at the Rogers house?

A. Yes.

Q. Did Mr. Cheatwood on that day come to your home?

A. He come to my son's. I was there.

Q. About what time in the morning was that?

A. It was pretty tolerably early.

Q. State about what time, to your best recollection.

[fol. 427] A. That time of the year, I imagine it was possibly six o'clock, somewhere around it, pretty early in the morning.

Q. At that time did Mr. Cheatwood take a blackjack out of his overcoat pocket, or a weapon of some kind?

Q. Yes sir.

Q. Did you see it?

A. Yes sir.

Q. Can you describe it?

A. Well, it was, of course, I guess, one kind of a blackjack. It wasn't one of these long, round ones. It was a machine-stamped red leather, made in the shape of a biscuit, and the handle come up flat.

Q. Flat on one end?

A. Yes sir.

Q. Did he in the presence of you and your daughter-in-law say that he had b at the confession out of W. D. Lyons?

A. He was talking to my daughter-in-law in the bed. The way we have rooms—

By the Court:

Q. Did your daughter-in-law hear it?

A. She hadn't got up.

Q. Where did this occur?

A. My son's house.

Q. In the house or out of the house?

A. In the house.

Q. Your daughter-in-law wasn't up yet?

A. No.

Q. And he remarked—

By Mr. Lattimore: Wait a minute. We object as not being the proper way to ask the question.

By Mr. Belden: Mr. Reporter, will you read back my question?

[fol. 428] By Reporter: "Did he in the presence of you and your daughter-in-law say that he had beat the confession out of W. D. Lyons?"

A. Yes sir.

Q. Did he tell you that he had done it with a blackjack?

A. He pulled the blackjack out of his right coat pocket and bucked his right knee up and whammed it two or three times and said, "I beat that boy last night for, I think, six—either six or seven hours." And he said, "I haven't even got to go to bed last night."

Witness excused.

By Mr. Belden: *The Defendant Rests.*

By the Court: State's rebuttal.

LESTER MERRITT, in behalf of the State of Oklahoma, in rebuttal testimony, after being duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Lattimore:

Q. State your name.

A. Lester Merritt.

Q. And you live where?

A. Fort Towson, Oklahoma.

Q. Calling your attention to the time of the murder of Mr. and Mrs. Rogers and the four year old child, and the burning of their house, do you remember that?

A. Yes.

Q. Were you out there the next morning?

A. I was.

[fol. 429] Q. Were you out there when Clarence Keys was using a rake around in the ashes?

A. Yes.

Q. What kind of a rake was it?

A. Just an ordinary garden rake.

Q. How long were the teeth?

A. I judge two inches long.

Q. How was he raking the ashes.

A. He was just raking over the ashes and the ashes falling back thru the teeth.

Q. How much of that ground where the house had been did he rake over?

A. He raked over all the east part of the house.

Q. Did he rake the ashes off?

A. No.

Q. The ashes were still there when he got thru raking?

A. That is right, yes sir.

Q. Do you know what you were looking for at that time out there in the ruins?

A. We were looking for a gun.

By Mr. Marshall:

Q. Did you not see him rake the east side?

A. I did.

By Mr. Lattimore:

Q. Did he rake the ashes off down to the dirt?

A. No, he didn't.

Witness excused.

By Mr. Lattimore: *The State Rests.*

By Mr. Belden: *The defendant rests.*

[fol. 430] DEFENDANT'S MOTION FOR DIRECTED VERDICT

By Mr. Belden: Comes now the defendant, the State having announced that it rests, and the defendant having announced that he rests, at the conclusion of all the evidence, and asks for a directed verdict in favor of the defendant, and that the defendant be discharged for the

reason that the evidence produced by the State, outside and separate of the confessions, do not prove the charges, and are insufficient upon which to base a conviction, and therefore asks for a directed verdict.

By the Court: Overruled, exceptions allowed.

Thereupon: The defendant filed herein and presented to the Court his certain Requested Instructions in said cause, which said requested instructions, together with all endorsements thereon, appear in the files hereof in words and figures as follows, to-wit:

DEFENDANT'S REQUESTED INSTRUCTION No. 1

In this case, the State relies on what is known in law as circumstantial evidence. Circumstantial evidence is testimony not based on actual personal knowledge or observation of the facts in controversy in the case, but is testimony of facts from which deductions or inferences may, or may not, be drawn. And you are instructed that you cannot convict the defendant on suspicions, probabilities, or suppositions, but before you can convict the defendant on circumstantial evidence alone, each fact or circumstance must be proved to your entire satisfaction [fol. 431] beyond a reasonable doubt, and the facts and circumstances so proved must form a complete chain, and conclusively point to the defendant's guilt, and must be wholly inconsistent with his innocence, and the facts proved to your satisfaction must be such as to exclude to a moral certainty every hypothesis or theory but that of the defendant's guilt.

Requested by defendant.

Refused and exceptions allowed.

Geo. R. Childers, Judge.

DEFENDANT'S REQUESTED INSTRUCTION No. 2

Gentlemen: You are instructed that if you find that at the time the confession was obtained at McAlester, that the defendant was still suffering from the treatment that he had received in the County Attorney's office or elsewhere by the officers that had him in custody or was in-

duced to sign the confession by reason of fear as a result of the conduct of the officers that had him in custody and that by reason thereof said confession was not a free and voluntary confession, you are not to consider the confession, or any of the evidenece therein contained.

Asked for by the defendant and refused, exception allowed.

Geo. R. Childers, Judge.

Endorsed: Filed in Open Court. Choctaw County, Okla. Jan. 30, 1941. Haskell Floyd, Court Clerk.

[fol. 432] Thereupon: The Court gave to the jury its instructions in writing as to the law in this case, which said instructions together with all endorsements thereon, appear in the files hereof as follows, to-wit:

IN DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted]

INSTRUCTIONS BY THE COURT—Filed Jan. 31, 1941

Gentlemen of the Jury:

The defendants, W. D. Lyons and Van Bizzell; are charged by information in this case with the crime of murder. It is charged in the information that the defendants W. D. Lyons and Van Bizzell, did, in Choctaw County, State of Oklahoma, on or about the 31st day of December, 1939, and anterior to the presentment thereof, commit the crime of murder in the manner and form as follows, to-wit:

That the said defendants then and there being did then and there while acting together and con-jointly with a common purpose, wilfully, wrongfully, intentionally, unlawfully and feloniously, with out justifiable or excusable cause and without authority of law, and with a premeditated design to effect the death of one Elmer Rogers, make an [fol. 433] assault in and upon the person of the said Elmer Rogers with a certain deadly and dangerous weapons, to-wit: a single barrel shot gun, a double bit ax, and by burning; that is to say that the said defendants with the said weapons then and there had and held in the hands of them the said defendants, did then and there shoot at and shoot the said Elmer Rogers then and there discharging from said

shot gun certain leaden shot at, upon and into the body of the said Elmer Rogers with the felonious intent to kill and murder the said Elmer Rogers, and did thereafter with the said ax then and there had and held in the hands of them the said defendants as aforesaid, chop, beat and crush the head and body of the said Elmer Rogers, then and there and thereby inflicting certain mortal wounds upon the said Elmer Rogers; and that after inflicting said wounds upon the said Elmer Rogers as aforesaid the said defendants did then and there set fire to the dwelling house of the said Elmer Rogers in which he was then and there residing at the time and in which his mortally wounded body lay upon the floor of said dwelling with the felonious intent to destroy said body of Elmer Rogers which said defendants had assaulted in the manner aforesaid with the felonious intent upon the part of said defendants to kill and murder the said Elmer Rogers and from which said mortal wounds the said Elmer Rogers died then and there as intended by the said defendants, contrary to the form of the statutes, in such cases made and provided, and against the peace and dignity of the State.

A severance has been granted in this cause, and the defendant W. D. Lyons alone is on trial at this time.

To this information the defendant has entered his plea of not guilty, and that plea of not guilty puts in issue every material allegation in the information contained.

[fol. 434] No. 1. The exact time the offense is alleged to have been committed is immaterial. Proof of the commission of the offense at any time prior to the 24th day of January, 1940, the date of the filing of the original complaint herein, and subsequent to the 16th day of No. 1907, the date of Statehood, will be sufficient as to the time.

No. 2. Homicide is the killing of one human being by another. Homicide is either murder, manslaughter, excusable or justifiable homicide.

Homicide is murder when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of some other person.

A design to effect death is premeditated within the meaning of the law if the intention to take life is deliberately formed in the mind before the act is done which results in death, no matter for how short a time.

The design to effect death may be formed instantly before committing the act by which it is carried into execution.

And the design to effect death is inferred from the fact of the killing, unless all the facts and circumstances in the case raise a reasonable doubt as to whether or not such design existed. Homicide committed with a design to effect death is none the less murder because the perpetrator was in a state of anger at the time of the homicide.

No. 3. You are instructed that there is no evidence in this case showing or tending to show that the homicide in this case was manslaughter in the first degree, and this degree of homicide will not be defined to you further than to say that it is certain kinds of killing done in a heat of passion, and without any intent or design to kill.

[fol. 435] No. 4. You are instructed that there is no evidence in this case showing or tending to show that the homicide in this case was manslaughter in the second degree, and this degree of homicide will not be defined to you further than to say that it is certain kinds of negligent killing.

No. 5. You are instructed that there is no evidence in this case showing or tending to show that the homicide in this case was excusable homicide, and this degree of homicide not be defined to you further than to say that it is certain kinds of accidental killing.

No. 6. You are instructed that there is no evidence in this case showing or tending to show that the homicide in this case was justifiable homicide, and this degree of homicide will not be defined to you further than to say that it is certain kinds of killing done in self-defense.

No. 7. You are instructed that all persons concerned in the commission of a crime, whether it be a felony, or a misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals and if you find in this case from the evidence beyond a reasonable doubt that one of the defendants did the acts charged in the information, and should you further find beyond a reasonable doubt from the evidence in this case that this defendant was concerned in the commission of the acts charged in the information, or aided and abetted in the commission of said acts,

then all persons concerned in the commission of said acts or who aided and abetted in the commission of said acts, would be guilty the same as though they directly committed the acts charged in the information.

To "aid and abet," may consist of words spoken, or acts done for the purpose of assisting in the commission of the [fol. 436] crime, or of encouraging its commission. To "abet" is to countenance, assist, give aid. The word "abet" includes knowledge of the wrongful purpose of the perpetrator, and counsel and encouragement in the crime.

No. 8. The State has introduced in evidence before you certain statements claimed to have been made by the defendant after his arrest, and while he was in the custody of the officers of the law, which statements are relied on in part by the State to establish the guilt of the defendant of the offense charged.

You are instructed that confessions and statements made by one charged with an offense must be carefully scrutinized, and received with great caution. Yet when they are made voluntarily and deliberately, such confessions and statements may be considered as evidence for and against the person making them, the same as any other evidence. But if a confession or statement is made by one in custody under such circumstances as show that he was induced to make the same by punishment, intimidation, or threats on the part of the persons who had him in charge, or that show that the confessions and statements were not freely and voluntarily made, then they cannot be considered as evidence against the person making them.

In this case, if you do not find that the confessions and statements by the defendant, while in custody, were freely and voluntarily made, and made without punishment, intimidation, or threats on the part of the persons having the defendant in custody, then you must disregard such statements or confessions as affording any evidence against the defendant whatever.

But the mere fact that the confession or statements, if any were made by the defendant, were made in answer to questions propounded to him while under arrest or in custody, will not be sufficient to exclude such statements or confession as evidence, or prevent you from considering the same, if the Statements, if any, were made freely and [fol. 437] voluntarily.

No. 9. You are, therefore, instructed that if you believe and find from the evidence in this case, beyond a reasonable doubt, that the defendant, W. D. Lyons, did, at any time prior to the filing of the original complaint herein, and since the 16th day of Nov. 1907, in Choctaw County, Oklahoma, wilfully, wrongfully, intentionally, unlawfully and feloniously, without justifiable or excusable cause, and without authority of law; and with a premeditated design to effect the death of one Elmer Rogers, did make an assault upon the said Elmer Rogers, by shooting the said Elmer Rogers with a certain shot gun, and by beating and crushing the body of the said Elmer Rogers with a certain ax, said shot gun and said ax being dangerous and deadly weapons had and held in the hands of him, the said W. D. Lyons, then and thereby inflicting certain mortal wounds upon the body of the said Elmer Rogers, and did then and there set fire to the dwelling house in which the mortally wounded body of the said Elmer Rogers lay, with the intent to destroy the said body of the said Elmer Rogers, all with the felonious intent on the part of the said W. D. Lyons to kill and murder the said Elmer Rogers, and from which mortal wounds so inflicted the said Elmer Rogers then and there died, then it will be your duty to find the defendant, W. D. Lyons, guilty of murder, as charged in the information herein.

No. 10. If you find the defendant, W. D. Lyons, guilty of murder, as charged in the information, and as herein defined to you, then you must assess his punishment at death by electrocution, or by imprisonment in the State Penitentiary for and during his natural life.

[fol. 438] No. 11. You are instructed that in arriving at a verdict in this case, you must be governed by the evidence that is permitted to go to the jury, and that you must entirely disregard any questions that may have been asked by counsel to which the Court has sustained an objection, and that you must entirely disregard and put from your minds any statements of counsel, if any such there be, which are not based upon the evidence in the case, or which are not reasonable deductions from the evidence, and the law as given you by the Court in these instructions.

No. 12. You are further instructed that in consideration of your verdict, you are bound by the testimony which the

Court has permitted to be introduced before you from the witnesses who have testified in the case, and that you are not permitted to consider or to be controlled by any knowledge which you may have which you have not obtained from the testimony of the witnesses during the trial of this case. No juror is permitted to tell or give any information which he may possess about any witness who testified in the case, other than information which has come to the juror from the testimony of witnesses while on the stand, and no juror is permitted to receive any private information about any witness, or any facts or circumstance in this case.

No. 13. The defendant is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and this presumption continues until every material allegation in the information is proven by competent and legal evidence to your satisfaction beyond a reasonable doubt, and if the evidence fails to satisfy your minds beyond a reasonable doubt of the guilt of the defendant, then it is your duty to give the defendant the benefit of such doubt and acquit him.

[fol. 439] No. 14. You are the sole judges of the facts proved in this case, and of the credibility of the witnesses who have testified before you, and of the weight and value to be given their testimony. In considering and weighing the evidence for the purpose of determining the facts in this case, you should use your common sense, your observation, your knowledge of human nature and human motives, and your experience in human affairs. In determining what credit you will give to the testimony of a witness you may take into consideration the interest of the witness, if any, in the result of this trial, the reasonableness or unreasonableness of his or her statements, the apparent truthfulness of a witness or want of it, his or her means of knowing the facts about which he or she testifies, his or her manner of giving testimony, whether or not the witness has been impeached, and the conduct and demeanor of the witness on the stand. All these matters being taken into account by you, together with all the other facts and circumstances in evidence before you, it is your province and your duty to give to each witness such credit and the testimony of each witness such weight and value as you believe it should have.

No. 15. If you believe from the evidence that any witness who has testified in this case has knowingly and wilfully sworn falsely to any material fact, then you may, if you deem proper, disregard the entire testimony of such witness, or you may give it such weight and value on other points as you may believe it should have. You are not bound to believe any witness unless you believe that the witness has testified truthfully.

No. 16. It is your duty, and you are therefore instructed, that you must consider all these instructions together as a whole, and that you must not consider any part or portion hereof to the exclusion of any other part or portion. You have taken a solemn oath to try this case according to the law and the evidence, and you have no authority nor right [fol. 440] to consider or to be controlled by anything other than the evidence you have heard in the trial of this case, and the law as it is given to you in these instructions.

No. 17. You will now listen to the argument of the counsel for the State and for the defendant, and you are instructed that their argument constitutes a legitimate part of the trial of this case, and you should carefully consider any suggestions that may be made by them within the record of this case which might assist you in analyzing the testimony of the witnesses and applying the law, in order that you may be assisted in arriving at a just and true verdict; but care should be taken by you that the argument of counsel be not confounded with the testimony of the witnesses or confusing as to the law of the case as contained in these instructions.

No. 18. It will require the concurrence of the entire jury to return a verdict in this case. When you shall have retired to your jury room, you may select one of your number as foreman, and when the whole twelve of you shall have agreed upon a verdict, you may sign the same by one of your number only as foreman and return it into court. When you shall have retired to your jury room for the consideration of your verdict, and when you shall have selected one of your number as foreman, you should then take up the consideration of this case in a careful and orderly manner, with an honest determination and endeavor to arrive at the truth of the matter, and when you shall have arrived at the truth of the matter to your satisfaction after a full and

free conference with your fellow jurors, you should have the courage of your honest convictions and write your verdict accordingly.

No. 19. You should first determine the guilt or innocence of the defendant, and if you find the defendant guilty, then [fol. 441] take up the question of the punishment. In arriving at your verdict you must be governed solely by a consideration of the evidence adduced before you, and the law as it is stated in these instructions, and you must not arrive at your verdict by casting lot, striking an average, or by any other manner or species of chance.

Geo. R. Childers, Judge.

[File endorsement omitted.]

Thereupon: The cause was argued to the jury on behalf of the State and on behalf of the defendant by their respective counsel, and the Court, after placing the jury in charge of sworn bailiffs of the Court for the night; took recess until nine o'clock in the morning. And thereafter, to-wit, at nine o'clock, on January 31, 1941, Court was reconvened as per order of adjournment, the jury, being present, the State being present by its counsel, and the defendant being present by his counsel and in his own proper person, whereupon this cause is submitted to the jury for deliberation of its verdict.

And thereafter, and on the same day, to-wit, on the 31st day of January, 1941, the jury duly empaneled and sworn in said cause, returned into open court its verdict in this cause, in words and figures, as follows, to-wit:

[fol. 442] IN DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted.]

VERDICT—Filed January 31, 1941

We, the Jury, duly empaneled and sworn in the above entitled cause, do, upon our oaths, find the above named defendant, W. D. Lyons, guilty of murder as charged in the information herein, and fix his punishment at imprisonment in the State Penitentiary for and during his natural life.

L. H. Knox, Foreman.

[File endorsement omitted.]

[fol. 443] IN DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted]

JOURNAL ENTRY OF TRIAL

Now on this the 27th day of January, 1941, same being a day of the regular January, 1941, term of this Court, the above entitled cause comes on for trial in its regular order upon the docket, the State of Oklahoma appearing by Norman Horton, County Attorney, and S. H. Lattimore, Assistant Attorney General, and the defendant, W. D. Lyons, having heretofore been granted a severance herein, appears in his own proper person, and by his attorneys, Stanley D. Belden, and Thurgood Marshall. And the State having announced ready for trial, the defendant asks and is granted permission to withdraw his plea of not guilty heretofore entered herein, and to file his demurrer to the information in said cause. And now the Court, after hearing said demurrer, and being well and sufficiently advised in the premises, overrules said demurrer, to which action of the Court the defendant excepts. Thereupon the defendant re-enters his plea of not guilty and announces ready for trial.

[fol. 444] And now, by order of the Court a jury of twelve good and lawful men of the body of Choctaw County, State of Oklahoma, is duly drawn, impaneled and sworn to well and truly try and true deliverance make between the State of Oklahoma and the defendant, and a true verdict render according to the law and the evidence, said jury being composed of the following named persons, to-wit:

Bob Fugett, L. H. Knox, Elmer Self, E. D. Lane, Gny Burrous, W. D. Welch, W. B. McDowell, Hugh Pickens, Rex Massengale, C. D. Stubbs, Walter Wilkins, and J. F. Males.

And now the County Attorney asks and is granted permission to endorse on the information the names of the following witnesses to be used in chief by the State: Dora Scott, Richard Scott, Innes Aikens, Annie Butler, and Mrs. W. A. Hall, said names of said witnesses having heretofore been served upon the defendant within the time prescribed by law.

Thereupon, the County Attorney reads the information filed in this case to the jury, and states the defendant's plea

thereto, and makes the opening statement for the State, and the defendant by his attorneys, reserves his statement at this time. And now Vernon Cheatwood, a witness for the State of Oklahoma, and a State Officer, is excused from the rule, to which action of the Court the defendant excepts and exception allowed.

The State proceeds with the introduction of its testimony in chief, and the hour for adjournment having arrived, the jury is now placed in charge of sworn bailiffs of the Court, and Court takes recess until nine o'clock tomorrow morning.

And now, on this the 28th day of January, 1941, Court is reconvened as per order of adjournment, and proceedings resumed in the trial of this cause, and the State proceeds with the introduction of its testimony in chief. And the hour for adjournment having arrived, the jury is now [fol. 445] placed in charge of sworn bailiffs of the Court, and Court takes recess until nine o'clock tomorrow morning.

And now, on this the 29th day of January, 1941, Court is reconvened as per order of adjournment, and proceedings resumed in the trial of this cause. Thereupon the State proceeds with the introduction of its testimony in chief, and having concluded the same, the State rests its case in chief, and the hour for adjournment having arrived, the jury is now placed in charge of sworn bailiffs of the Court, and Court takes recess until nine o'clock tomorrow morning.

Now on this the 30th day of January, 1941, Court is reconvened as per order of adjournment, and proceedings in the trial of this cause resumed, whereupon the defendant by his attorneys makes his opening statement to the jury, and introduces his testimony in chief rests, and thereupon the State introduces its testimony in rebuttal and rests. And now the defendant asks the Court for a directed verdict of not guilty, which request is by the Court refused and to which action of the Court instructs the jury in the law in the case, and counsel argue the case to the jury, and now the hour for adjournment having arrived, the jury is now placed in charge of sworn bailiffs of the Court, and Court takes recess until nine o'clock tomorrow morning.

And now on this the 31st day of January, 1941, Court is reconvened as per order of adjournment, and proceedings are resumed in the trial of this cause, and the cause having been submitted to the jury, the jury now retires in charge of sworn bailiffs of the Court to deliberate upon its verdict.

And thereafter, and on the same day, to-wit: on the 31st [fol. 446] day of January, 1941, comes into open court the said jury duly impaneled and sworn in this cause, and the defendant, W. D. Lyons, being present in Court in his own proper person, and by his attorneys, and the County Attorney being present in Court, the said jury returns its verdict in words and figures as follows, to-wit:

"We, the jury, duly empaneled and sworn in the above entitled cause, do, upon our oaths, find the above named defendant, W. D. Lyons, guilty of murder, as charged in the information herein and fix his punishment at imprisonment in the State Penitentiary for and during his natural life. L. H. Knox, Foreman."

And the said verdict is now by the Clerk read aloud in open court in the presence of the said jury and the defendant, and the jury being now by the Court asked if it is their verdict, reply that it is, and the said verdict is by order of the Court filed in the presence of the jury, and recorded in the minutes of this Court; and the said jury is by the Court discharged from further consideration of this cause, and the defendant is remanded to the custody of the Sheriff of Choctaw County, Oklahoma, to await the judgment and sentence of this Court.

Geo. R. Childers, District Judge.

[fol. 447] IN DISTRICT COURT OF CHOCTAW, COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed February 10, 1941

Comes now the defendant, W. D. Lyons, and respectfully moves and requests the court to set aside the verdict of the jury rendered herein and to grant defendant a new trial because of the errors committed by the court and jury which substantially affect the defendant's rights—all of which errors were excepted to by the defendant at the time of the trial. The defendant would show to the court that errors were committed in the following particulars:

First. Errors in overruling the defendant's demurrer to the information and in overruling defendant's motion to quash the information.

Second. After the court having found that the first confession was obtained through force, violence and fear, and having ruled that said confession should be rejected because it was not a free and voluntary confession and the second confession having been obtained the same day and presumption of law being that if the first confession is obtained through force and violence (the court found it was in this case) that the second confession is the product of the same influence and the second confession having been obtained the same day and while the defendant was still [fol. 448] suffering from the punishment and still in fear and in the custody and under the power of the officer, the second confession, therefore, was not a free and voluntary confession and the court erred in permitting the second confession to be admitted in evidence. That the court, in admitting the second confession in evidence violated the Fourteenth Amendment to the Constitution of the United States, in depriving the defendant of due process of law and equal protection.

Third: That the court erred in its instructions in overruling defendant's requested instructions, numbers one and two, thereby violating the Fourteenth Amendment to the Constitution of the United States in depriving the defendant of due process of law and equal protection.

Fourth. That the court erred in permitting the evidence obtained in the first confession as to the whereabouts of the ax and of the shotgun shells, the information of same having been obtained in the first confession and, therefore, not admissible, the same having violated the Fourteenth Amendment to the Constitution of the United States in depriving the defendant of due process of law and equal protection.

Fifth. That the court erred in permitting the State to introduce evidence of admissions in the form of statements and acts of the defendant which occurred immediately after the first confession, as the information then obtained from the defendant was obtained while defendant was still under the influence of the fear which existed at the time of and induced the signing of the first confession, thereby violating the Fourteenth Amendment to the Constitution of the United States in depriving the defendant of due process of law and equal protection.

[fol. 449] Sixth. That the court erred in permitting either of the confessions or evidence obtained by force and violence and that had the confessions and evidence been suppressed, there was nothing upon which a jury could have based a conviction and for this and all of the reasons above set forth, defendant asks that he be granted a new trial.

Stanley D. Belden, Thurgood Marshall, Attorneys
for Defendant.

[File endorsement omitted.]

[fol. 450] IN DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—February 10,
1941

Now on this 10th day of February, 1941, same being a day of the regular January, 1941, term of this Court, the above entitled causes comes on for hearing upon the motion of defendant for a new trial herein; and the State of Oklahoma appearing by Norman Horton, County Attorney, and the defendant appearing in person; and by his attorney, Stanley D. Belden, and the Court having heard and considered said motion, and the argument of counsel thereon, and being fully advised in the premises, is of the opinion that the same should be overruled.

It is, therefore, by the Court ordered and adjudged that the said motion for a new trial be, and the same is, hereby overruled, to which ruling of the Court the defendant excepts, and his exceptions are noted and allowed by the Court.

Geo. R. Childers, District Judge.

[fol. 451] IN THE DISTRICT COURT OF CHOCTAW COUNTY,
STATE OF OKLAHOMA

No. 2712

Murder

THE STATE OF OKLAHOMA, Plaintiff,

vs.

W. D. LYONS, Defendant

JUDGMENT AND SENTENCE ON CONVICTION—February 10, 1941

Now on this, the 10th day of February, A. D. 1941, the same being a judicial day of the regular January term, 1941, of the District Court of Choctaw County, State of Oklahoma, the above entitled cause comes on for final judgment and sentence of the Court, this being the day heretofore fixed by the Court as the time for pronouncing judgment and sentence against the said defendant. The defendant, W. D. Lyons, appears in open Court in his own proper person, and by his counsel.

And, the said defendant W. D. Lyons having been duly charged in the said Court by an information duly presented and filed, with the crime of murder, and the said defendant having been duly arraigned thereon, and having entered a plea of not guilty, as charged in the said information; and [fol. 452] the said defendant having been duly tried by a jury of twelve good and lawful men of the body of Choctaw County, Oklahoma, and having been found guilty by the said jury of the crime of murder, as charged in the said information, and motion for a new trial having been considered and overruled, nor motion in arrest of judgment in behalf of the said defendant having been filed or presented, the said defendant is now by the Court asked if he has any legal cause to show why judgment and sentence of the Court should not be pronounced against him at this time, and, no legal cause being shown, and none appearing to the Court, the Court being fully advised in the premises, doth hereby adjudge and sentence the said defendant for the said crime by him committed:

It is therefore by the Court considered, ordered and adjudged, and it is the judgment and sentence of the law pronounced by the Court, that the said defendant W. D. Lyons for the said crime of murder by him committed, be imprisoned in the State Penitentiary, located at McAlester, Oklahoma, at hard labor, for and during a—his natural life; said term of imprisonment to begin on the day of the delivery of the said defendant to the warden of the said penitentiary, and that the said defendant pay the costs of this prosecution, \$—, for which judgment is hereby rendered against said defendant, and the payment of which shall be enforced by imprisonment of the said defendant in said penitentiary until the cost shall have been satisfied in the manner provided by law.

It is further considered, ordered and adjudged by the Court that the sheriff of Choctaw County, State of Oklahoma, transport the said defendant, W. D. Lyons, to the said State penitentiary, at McAlester, Oklahoma, and deliver him, the said defendant to the warden of the said penitentiary, and that the said warden of the said penitentiary do detain and imprison the said defendant, at hard [fol. 453] labor, in accordance with this judgment and sentence.

It is further considered, ordered and adjudged by the Court that the clerk of this Court do immediately make and certify under the seal of the Court, and deliver to the said Sheriff of Choctaw County, State of Oklahoma, two copies of this judgment and sentence; one of which said copies shall accompany the body of the said defendant to the said penitentiary and shall be left therewith at said penitentiary, which said copy shall be full and sufficient warrant and authority for the warden of said penitentiary to detain and imprison the said defendant, in accordance with this judgment and sentence; and the other copy to be full and sufficient warrant and authority for the said Sheriff of Choctaw County, Oklahoma, to transport and imprison the said defendant in said penitentiary, as herein provided; said last named copy to be returned to the Clerk of this Court with the doings of the said sheriff endorsed thereon, showing the manner in which this judgment and sentence has been executed.

Thereupon the Court notifies the said defendant of his right to appeal from the judgment and sentence of this

Court to the Criminal Court of Appeals of the State of Oklahoma.

Done in open Court at Hugo, Choctaw County, Oklahoma, on this the 10th day of February, A. D. 1941.

Geo. R. Childers, Judge of the District Court of Choctaw County, Oklahoma. Endorsed: Filed February 17, 1941. Haskell Floyd, Clerk of the District Court.

[fol. 454] IN DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted]

ORDER FIXING TIME FOR MAKING AND SERVING CASE-MADE ON
APPEAL

Now on this 10th day of February, 1941, same being a day of the regular January, 1941, term of this Court, comes the defendant, W. D. Lyons, in person and by his attorney, Stanley D. Belden, the State of Oklahoma appearing by Norman Horton, County Attorney, and gives notice in open court of his intention to appeal from the judgment and sentence of this Court, to the Criminal Court of Appeals of the State of Oklahoma, and asks for an order of the Court extending time in which to prepare and serve a case-made herein for such appeal.

It is, therefore, by the Court ordered and adjudged that said defendant, W. D. Lyons, have, and he is hereby granted ninety days from this date in which to prepare and serve case-made herein, the County Attorney to be allowed ten days thereafter within which to suggest amendments thereto, same to be settled and signed on five days' notice in writing made by either party,

Geo. R. Childers, District Judge.

[fol. 455] IN DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed February 10, 1941

Comes now said defendant, W. D. Lyons, and hereby gives notice to Norman Horton, County Attorney of Choctaw County, Oklahoma, of his intention to appeal to the Criminal

Court of Appeals from the verdict and judgment rendered herein against the defendant on the 31st day of January, 1941, and requests that this notice be entered on the trial docket of this court as is provided by law.

Dated this 10 day of February, 1941.

Thurgood Marshall, Stanley D. Belden, Attorneys
for Defendant.

I, Norman Horton, County Attorney of Choctaw County, Oklahoma, do hereby acknowledge service of the above Notice of Appeal.

Norman Horton, County Attorney, By E. A. Blythe,
Assistant County Attorney.

[File endorsement omitted.]

[fol. 456] IN DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed February 10, 1941

Comes now said defendant, W. D. Lyons, and hereby gives notice of Haskell Floyd, Court Clerk of Choctaw County, Oklahoma, of his intention to appeal to the Criminal Court of Appeals from the verdict and judgment rendered herein against the defendant on the 31st day of January, 1941, and requests that this notice be entered on the trial docket of this court as is provided by law.

Dated this 10 day of February, 1941.

Thurgood Marshall, Stanley D. Belden, Attorneys
for Defendant.

I, Haskell Floyd, Court Clerk of Choctaw County, Oklahoma, do hereby acknowledge service of the above Notice of Appeal.

Haskell Floyd, Court Clerk.

[File endorsement omitted.]

[fol. 457] IN DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted]

ORDER EXTENDING TIME

On this the 23rd day of April, 1941, it appearing to the undersigned Judge of said Court, upon the application of

the defendant, W. D. Lyons, that the time heretofore granted herein within which said defendant could make and serve a case-made on appeal to the Criminal Court of Appeals of the State of Oklahoma, in said cause which said extension of time expires on the 10th day of May, 1941, has been insufficient:

It is hereby ordered by the Court that a further extension of thirty days from the said 10th day of May, 1941, be granted said defendant, W. D. Lyons, to make and serve a case-made on appeal to the Criminal Court of Appeals in said cause; the State to have ten days thereafter within which to suggest amendments thereto, and said case-made to be settled and signed on five days' written notice made by either party.

Witness my hand this the 23rd day of April, 1941.

Geo. R. Childers, Judge.

[fol. 458]

RECITAL AS TO CASE-MADE

The above and foregoing sets out fully and correctly all the pleadings filed in said cause, all motions filed or made, all rulings and orders made thereon, all exceptions taken by the defendant to such rulings and orders, all exceptions of the defendant, all the evidence offered, introduced, or received upon the trial, all the exceptions to the same, all the instructions to the jury given and exceptions of the defendant thereto, the verdict of the jury and the judgment of the Court thereon, and exceptions of the defendant thereto, and the same is a true and correct statement and correct transcript of all the pleadings motions, evidence, findings, judgments and proceedings had in said cause.

[fol. 459] IN DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted]

SERVICE OF CASE-MADE

To the above-named Plaintiff and its attorney of record, Norman Horton, County Attorney of Choctaw County, Oklahoma, Greeting:

The above and foregoing case-made is hereby tendered to and served upon you as a full, true and correct state-

ment and transcript of the pleadings and proceedings had in the above entitled cause, and the evidence therein upon which judgment and sentence are based, and as a full, true, correct, and complete case-made in said cause.

Dated this the 5 day of May 1941.

Stanley D. Belden, Thurgood Marshall, Attorneys
for Defendant.

I, Norman Horton, County Attorney of Choctaw County, State of Oklahoma, hereby accept and acknowledge service of the above and foregoing case-made, this the 5 day of May 1941.

Norman Horton, County Attorney Choctaw County,
State of Oklahoma.

[fol. 460] IN DISTRICT COURT OF CHOCTAW COUNTY

[Title omitted]

STIPULATION AS TO CASE-MADE

It is hereby agreed by and between the undersigned, attorneys for the State of Oklahoma, and for the defendant, that the above and foregoing contains a full, true and correct statement and transcript of all the proceedings and proceedings in said cause, including all pleadings filed and proceedings had, all the evidence offered or introduced by both parties, all orders and rulings made and exceptions allowed, and all of the record upon which the judgment and journal entry in said cause were made and entered. The plaintiff hereby waives, together with the defendant, notice of time of presentment and settlement of case-made, and hereby waives the right to suggest amendments hereto. The plaintiff further waives the service of summons in error from the Criminal Court of Appeals of the State of Oklahoma, and hereby agrees to be bound in the same manner as if such summons had been issued.

Witness our hands this the 5 day of May 1941.

Stanley D. Belden, Thurgood Marshall, Attorneys
for Defendant. Norman Horton, County Attorney
of Choctaw County, Oklahoma.

[fols. 461-555] IN DISTRICT COURT OF CHOCTAW COUNTY
[Title omitted]

CERTIFICATE OF TRIAL JUDGE

I, the undersigned, Judge of the District Court of Choctaw County, Seventeenth Judicial District, State of Oklahoma, hereby certify that the foregoing was presented to me as a case-made in the action above entitled, and the State having waived notice of time of settlement, and the defendant having so done, and the State having waived its right to suggest amendments and having agreed that the above is a true and correct case-made, the defendant appearing by his attorney, Stanley D. Belden, I now settle and sign the same as a true and correct case-made and direct that it be attested and filed by the Clerk of this Court.

Witness my hand at Hugo, in Choctaw County, Oklahoma, this the 5th day of May, 1941.

Geo. R. Childer, District Judge.

Attest: Haskell Floyd, Court Clerk of Choctaw County, State of Oklahoma.

[File endorsement omitted.]

[fol. 556] [File endorsements omitted.]

IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

No. A-10,108

W. D. LYONS, Plaintiff in Error,

vs.

THE STATE OF OKLAHOMA, Defendant in Error

SYLLABUS

1. A judicial confession is one made before a committing magistrate or in a court in the due course of legal proceedings.
2. An extrajudicial confession is one made elsewhere than before a magistrate or in court.
3. Confessions are either voluntary or involuntary. If voluntary they may be admitted in evidence. If involuntary, they are inadmissible.

4. A voluntary confession is one made by an accused freely and voluntarily, without duress, fear of compulsion in its inducement, and with full knowledge of the nature and consequences of the confession.

5. A confession of the accused shown not to have been freely and voluntarily made, but induced by hope or promise of benefit, or through fear, or by personal violence and torture, or threats thereof, except to the extent that it may in some instances be used to impeach the testimony of the accused, is involuntary and inadmissible.

[fol. 557] 6. When two or more confessions are made by an accused, some of which are voluntary and some of which are involuntary, the ones made voluntarily are admissible and the ones made involuntarily are inadmissible.

7. The general rule is that where a confession has been obtained in such a manner as to come within the terms of an involuntary confession, any statement made by accused while under that influence is inadmissible. However, a voluntary confession thereafter made is not affected by the fact that a previous one was obtained by improper means if it is shown that these influences are not operating when the later confession is made.

8. The presumption that a subsequent confession of the same crime flows from the same improper influences which induced a prior confession is not a conclusive one and may be overcome by proof that the influences present at the prior confession did not operate on the second or subsequent confessions.

9. Where the question arises as to whether a confession is voluntary or involuntary, the correct practice in this State is for the court to immediately withdraw the jury, and hear all of the evidence both for and against the competency of the same, and all the facts and circumstances under which the same was made, and decide whether the confession was voluntary or involuntary. If voluntary, it is presented, together with all the facts and circumstances surrounding the giving of the same, to the jury. If involuntary, it is inadmissible.

[fol. 558] 10. The court may then by proper instructions present to the jury the question of the voluntariness and involuntariness of the confession, and permit them to pass

upon the evidence as to whether the confession was freely and voluntarily made, and if they find it was, to give it consideration, and if they find it was not freely and voluntarily given that they should disregard the same, and not consider it as evidence against the party giving it. But it is first the duty of the court to determine whether it is voluntary or involuntary before submitting this issue to the jury.

11. Record examined and found that the trial court followed the procedure as above outlined, and the first confession was held to be involuntary and therefore inadmissible in evidence, but that the second and third confessions were voluntary, and therefore admissible. **HELD:** that the court did not err in permitting the second and third confessions to be introduced in evidence.

12. By permitting the introduction of confessions designated as number two and number three, defendant was not denied due process of law, and equal protection of the law, as guaranteed by the Constitution of the United States.

13. Where a second and third confession are admitted in evidence as voluntary, defendant has the right to introduce before the jury evidence of previous confessions for two reasons. (a) For the purpose of having the court instruct the jury and permit them to pass upon the question of whether or not the latter confessions were voluntary confession; and (b) for the purpose of permitting all of the [fol. 559] evidence to be placed in the record so that it might be contended that the subsequent confessions were so connected with the first that the defendant at the time of making the later confessions was under fear by reason of the conditions which existed at the time he made the first confession.

14. Where the evidence as above outlined is introduced by the defendant, it can not be complained that it was error for which the State was responsible.

15. Where the general charge given by the court covers the principles contained in a requested instruction, it is not error for the court to refuse the requested instruction.

16. Elected public officials should with diligence and zeal use every lawful effort to ferret out crime and punish offenders, but persons arrested therefor should not be sub-

jected to indignities, punishment, or inquisitorial examinations such as are modernly known as the "sweat box."

17. It is provided by Okla. Stat. 1931, sec. 2760, Tit. 22 Okla. Stat. Ann. 1941, sec. 176:

"If the offense charged in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrants or some other magistrate in the county."

And sec. 2765, Okla. Stat. 1931, Tit. 22, Okla. Stat. Ann. 1941, sec. 181:

[fol. 560] "The defendant must, in all cases, be taken before the magistrate without unnecessary delay."

Every officer should follow the terms of these statutes.

18. The mere fact that a defendant did not have counsel appointed to represent him at a preliminary hearing is not a reason for holding that he was denied the due process clause of the Constitution of the United States, where the record discloses that counsel for his co-defendant appeared at the preliminary examination on behalf of both defendants, and that he had able counsel to defend him at his trial, and they had ample opportunity and time to prepare therefor.

APPEAL FROM THE DISTRICT COURT OF CHOCTAW COUNTY, OKLAHOMA

Geo. R. Childers, Judge

Defendant was convicted of the crime of murder, sentenced to serve a term of life imprisonment in the State Penitentiary, and appeals. Affirmed.

Stanley D. Belden, Cushing, Oklahoma, Thurgood Marshall, New York City, N. Y., Attorneys for Plaintiff in Error; Morris L. Ernst, New York City, N. Y., Benjamin Kaplan, New York City, N. Y., Attorneys for American Civil Liberties Union, Amicus Curiae; Mac. Q. Williamson, Attorney General, Sam H. Lattimore, Assistant Attorney General, Norman Horton, County Attorney, Choctaw County, Oklahoma, Attorneys for Defendant in Error.

[fol. 561] OPINION—Filed June 2, 1943; Withdrawn and Re-filed June 4, 1943

BAREFOOT, Judge:

Defendant, W. D. Lyons, was charged jointly with one Van Bizzell in the District Court of Choctaw County, Oklahoma, with the crime of murder, secured a severance, was tried, convicted and sentenced to serve a term of life imprisonment in the State penitentiary, and has appealed.

For a reversal of this case, the following errors are cited:

“I. The admission in evidence of the second confession obtained at McAlester was a denial of due process of law and equal protection of the laws as guaranteed by the United States Constitution and therefore reversible error.

“II. Statements made to Sheriff Duncan at McAlester likewise should not have been admitted in evidence.

“III. The refusal to grant the defendant's requested instruction No. 2 was reversible error.”

Before proper consideration of these errors, it is necessary to give a brief statement of the facts upon which they are based.

The charge of murder against this defendant was the outgrowth of the killing of Elmer Rogers and his wife and minor son, Elvie Dean Rogers, age four years, in their country home near Fort Towson, in Choctaw County, Oklahoma, on the night of December 31, 1939. Both Mr. and [fol. 562] Mrs. Rogers were shot to death with a shot gun, and Mrs. Rogers was mutilated with an axe. Coal oil was then poured on the house and it was set on fire, burning the bodies of both, together with their young son who was asleep in the home, beyond recognition. Two other young sons of Mr. and Mrs. Rogers, James Glenn Rogers age eight, and Billy Don, a small baby, escaped from the house and were saved. The oldest son was a witness for the State at the trial of the defendant. The information charges defendant with the murder of Elmer Rogers.

The crime is one of the most revolting that has ever been perpetrated in this State. A man and his wife were killed, with their minor child, their bodies were burned beyond recognition. The motive for the killing was robbery.

The defendant was arrested the evening of January 11, 1940, at his home in Hugo, Choctaw County. He was taken by officers to the county jail. He remained in jail for a period of eleven days and no charges were made against him until after that time.

On the night of January 22, 1940, or the following morning, a confession was taken from the defendant by the officers of Choctaw County. The facts surrounding the securing of this confession will be further discussed in this opinion. It will be denominated as confession number one.

After this confession had been secured, and in the after-[fol. 563] noon of January 23, 1940, defendant was taken from the Choctaw County jail at Hugo, to Antlers, the county seat of Pushmataha county, by Floyd Brown, a deputy sheriff, and special officer Reasor Cain, and placed in the county jail of that county. Some time near six or six thirty on the same afternoon, deputy sheriff Van Raulston and Roy Marshall, a barber at Antlers, took defendant to the State penitentiary at McAlester for safe-keeping. Mr. Raulston had been severely injured in an automobile accident and was still physically weak, so Mr. Marshall went along to drive the car.

There is some conflict in the evidence as to the exact time they arrived at the penitentiary, but it was some time between eight and nine thirty that night. Upon their arrival at the penitentiary, they met the warden, the Honorable Jess Dunn (now deceased), and a second written confession was taken from the defendant, the details of which will later be discussed, but which is not designated as confession number two.

After defendant had been in the penitentiary three or four days, and during the month of January, 1940, he made a statement to Cap Duncan, who was at that time a sergeant in the penitentiary, and who had, prior to that time, been sheriff of Choctaw County. Bert Crawford, a guard at the penitentiary who had once lived at Fort Towson and knew W. D. Lyons and the Rogers family, was present at the time this statement was made. It will be discussed later, and will be designated as confession number three. [fol. 564] Defendant was taken from the penitentiary at McAlester to Hugo, Choctaw County, for a preliminary

hearing on January 28, 1940. The exact date of the filing of the complaint is not revealed by the record.

Defendant's trial was begun on the 27th day of January, 1941, over one year after his arrest. After the jury was empanelled and sworn and a number of witnesses had been introduced by the State, the State presented as a witness the Hon. Jess Dunn, Warden of the State penitentiary, and, after certain preliminary questions were asked, offered in evidence what has been designated as confession number two, being the one made at the penitentiary on the night of January 23, 1940.

The trial court immediately excused the jury from the court room and proceeded to hear evidence as to the admissibility of this confession; the hearing being for the purpose of determining whether or not the confession was a voluntary one. At this hearing counsel for defendant presented evidence, including the testimony of the defendant. They had him testify fully as to the treatment he claimed he had received while in the custody of the officers at the jail in Hugo, Choctaw County, prior to the first confession, and also as to the treatment he claimed he had received after he had been taken to the penitentiary, and prior to the second confession. There was no attempt on the part of the State to introduce the first confession, other than was developed on cross examination of the defendant, [fol: 565] after counsel for defendant had gone into the question.

At the conclusion of the introduction of evidence by the defendant before the court, the State introduced evidence in rebuttal. This evidence as to the treatment of the defendant by the officers was in direct conflict with the testimony of the defendant, the officers testifying that he had not been mistreated, the defendant testifying that he had. The trial court, after hearing all the evidence in the absence of the jury, announced that he found that the second confession, taken by the Warden of the penitentiary on the night of January 23, 1940, was a voluntary confession, and that it could be introduced in evidence. The court, in making this announcement, said that the first confession was involuntary and could not be introduced, although there was no attempt on the part of the State to introduce the same. Proper exceptions were taken by counsel for defendant, and the jury was recalled and the trial proceeded.

It may be stated that the State in its case in chief did not refer to the first confession before the jury, but counsel for the defendant fully developed before the jury the facts of both the first and second confessions. This was by cross examination of the witnesses for the State, and by the evidence of the defendant himself, and other witnesses. In [fol. 566] introduction of this testimony on the part of the defendant was proper, and was evidently for two reasons. First, for the purpose of having the court instruct the jury and permit them to pass upon the question of whether or not the second confession was a voluntary confession. Second, for the purpose of permitting all of the evidence to be placed in the record with reference to the first confession so that it might be contended, as is here done, that the second confession was so connected with the first that the defendant at the time of making the second confession was under fear and made the same by reason of the conditions which existed at the time he made the first confession. We here state that the trial court gave the jury an instruction to which reference will hereafter be made, in which he submitted to them the question as to whether or not the second confession was voluntarily made, and instructed them that if they found as a matter of fact, after hearing all the testimony, that the second confession was not a voluntary statement, that they should disregard the same, and not consider it.

We consider the above a fair statement of the issues and proceedings of the trial up to the time of the trial of defendant before the jury. This brings us to a consideration of the first assignment of error in defendant's brief. It is considered under three heads:

"A. Confessions secured by threats and violence are not admissible in evidence at the trial of accused."

[fol. 567] As a general proposition the above statement is correct. If the State had offered in evidence the first confession, we would not hesitate to reverse this case for that reason. There was a direct conflict between the testimony of the defendant and witnesses for the State with reference to the treatment defendant received; but there is sufficient evidence in the record to corroborate his statement that the first confession would be considered as an

involuntary one, under the law. And we here unhesitatingly condemn the methods used in obtaining this confession.

The defendant testified to having been beaten with a blackjack by a special investigator of the Governor, who was assisting the officers of Choctaw County in their effort to obtain a confession from him; that he was taken from the county jail to the office of the county attorney, and was kept in the room from six thirty in the afternoon until near four o'clock the next morning, and that during this time he was tortured by being beaten and struck, and that at one time a pan of bones and teeth taken from the bodies of the people whom it was claimed he had murdered, was placed in his lap, and he was forced to feel them and hold them in his hands, while questions were being propounded to him.

Many officers of the law were present during the time he was being questioned, including the sheriff and county attorney of Choctaw County. However, the inquiry had been [fol. 568] turned over to a great extent to the investigator from the Governor's office, who claimed that he was an expert of many years experience in securing confessions from parties who were accused of committing crimes. All of the officers who were present denied the evidence of the defendant; and all testified that he was not struck, or injured in any manner, either while he was being taken to the jail or at the time he was being questioned. But they did all admit that the pan of human bones and teeth had been placed in his lap, and that he had been made to feel of them and hold them in his hand while being questioned. They also testified to his being questioned by the investigator from the Governor's office, and the county attorney.

The defendant testified that his first confession was made about four-thirty in the morning. The officers testified it was made about twelve-thirty or one-thirty in the morning. Many of the deputies from the sheriff's office were not present at all times, but were in and out of the room at different times. The questions propounded to the defendant by the county attorney revealed that he was present, and that he knew defendant was being questioned; that he participated in the questioning, and that he asked defendant: "I was not in the office until six thirty, was I, when they beat you?", and, "Isn't it true that Vernon Cheatwood had a strap of leather, and was tapping you like that, because you refused to answer questions they put to you?"

[fol. 569] After defendant made the first confession that he and his co-defendant killed Mr. and Mrs. Rogers, and that they had applied coal oil to the walls and set fire to the house, after placing the bodies therein, he was returned to the jail and the next morning was taken to the scene of the crime. There, under his direction, the axe with which Mrs. Rogers had been struck was found, and at a place close by the shot gun shells were found that had been fired in the gun he had. The defendant directed the officers to the places where the axe and shot gun shells were found.

Under the above statement we think the court was clearly correct in excluding the first confession as being involuntary. And in passing we cannot refrain from calling attention to the fact that it is the sworn duty of the duly elected county attorneys and sheriffs of the counties of this State to do everything in their power for the enforcement of the law in their respective communities, and especially in ferreting out crime and bringing to justice one who has committed such a crime as the record in this case reveals. At the same time, one charged with crime has certain rights guaranteed him by the Constitution of the United States, and of this State. No peace officer should violate these rights, or permit them to be violated, and it is just as much the duty of the officers to protect the rights of defendants as it is to ferret out crime. It is not the right [fol. 570] or the duty of an officer to secure from one whom he has arrested and has in his custody, an involuntary confession by the use of force, threats, violence or promises of leniency.

The Supreme Court of the State of Iowa in the case of *State v. Thomas*, 193 Iowa 1004, 188, N. W. 689 has expressed in forceful language the views of many courts in this country, including our own Court, when it says:

"Before leaving this feature of the case, we think it not improper to say that, while diligence and zeal in public prosecutors and officers of the law to ferret out crime and punish offenders are highly commendable qualities, there is in too many cases a regrettable tendency to exercise their authority without due regard to the rights which pertain to every citizen until he has forfeited them by conviction of crime. If a crime has been committed, an officer of the law may properly apprehend and restrain of his liberty any person charged

therewith for whose arrest he holds a warrant, and even without warrant he may arrest one who commits a public offense in his presence. And if a public offense has been in fact committed by some one, and the [fol. 571] officer has reasonable ground for believing that any given person is guilty of it, he may properly arrest such person without warrant.

"An arrest being lawfully made, it becomes the duty of the officer to promptly produce his prisoner to the proper magistrate to be dealt with according to law. Code, tit. 25, cc 10 and 11. But it is not within the province of the public prosecutor or sheriff or policeman or detective or of all together to assume the guilt of a person not under arrest and for whose apprehension they hold no writ and restrain him of his liberty or subject him to the indignity of inquisitorial examination, and grill him by methods which pertain to that modern instrument of torture known as the 'sweat box.' The mere fact that those who assume such authority and engage in such practices are public officers does not exonerate them from the charge of violating the law of which they are the sworn defenders or differentiate them in any legal sense from the mob. If the sheriff and county attorney in this case had reason- [fol. 572] able ground to believe defendant was guilty of the crime charged, it was, as we have already indicated, within the scope of their duty and authority to arrest him and produce him before the magistrate, where an examination could be had in an orderly and lawful way, and the rights of the state, on the one hand, and of the accused, on the other, could be properly protected. Instead of this, they constituted themselves a tribunal unknown to the law and proceeded without warrant to subject the man to a secret examination, from which his friends and his counsel, were carefully excluded. They assumed his guilt, and refused to credit his denials and his protestations of innocence, or to accept anything he might say in his own behalf until they had extorted from him the alleged confession. Such proceedings are without excuse or justification, and to tolerate them or to ignore them without rebuke is to bring reproach upon the law and convert the administration of justice into an engine for the perpetration of rank injustice.

[fol. 573] "The trial court adopted the theory that the question whether the alleged confession was freely and voluntarily made was for the jury, and in its charge told the jury that, unless they found such confession had been freely and voluntarily made, it should be rejected and given no weight against the defendant. It is the contention of appellant that, while this statement of the legal effect of a confession is substantially correct, the court erred in submitting the question of its voluntary character to the jury. There is some confusion in the authorities upon this proposition, but it is settled in this state that, where the free and voluntary character of the statements relied upon as a confession is the subject of dispute or conflict in the evidence, the question may properly be submitted to the jury. *State v. Stormis*, supra; (113 Iowa 391, 85 N. W. 612, 86 Am. St. Rep. 380); *State v. Bennett*, 143 Iowa 214, 121 N. W. 1021. If, however, it clearly appears from the record that the alleged confession was not freely and voluntarily made, or if the state, by its own evidence, negatives these essentials to its use in evidence, [fol. 574] it is the duty of the court to sustain the objection and refuse its submission to the jury. *State v. Chambers*, 39 Iowa, 179; *State v. Jay*, 116 Iowa 264, 89 N. W. 1070."

See also note 79 A. L. R. 457, *State v. Thavanot*, 225 Mo. 545, 125 S. W. 473, 20 Am. Cas. 1122.

The citizens of every community look to their duly elected officers for the enforcement of the law. The practice of permitting someone designated as an "investigator," from the Governor's office, or from any other department, to come in and take charge of an investigation and mistreat a prisoner who is being held by the sheriff of any county should not be tolerated. And the county attorney should not permit one who is in the custody of the law to be brought to his office and put through third degree methods by whipping or beating, or permitting such an act as placing a pan of bones in his lap, as was done in the instant case, in order to secure a confession, when he knows it is certain to be held as involuntarily given and not subject to admission in any court. There are very few instances when all the facts are taken together but will show one's guilt, if he is guilty, and it is not necessary that a confession be obtained in every case.

to the end that the guilty party may be properly brought to [fol. 575] justice: The facts in the instant case clearly demonstrate this.

Under subdivision "B" of assignment of error one, it is contended:

"Where a confession is obtained by such methods as to make it involuntary, all subsequent confessions made while accused is under the operation of the same influence are likewise involuntary."

This statement could well be admitted as true as a strict proposition, but the question that confronts us is, was the subsequent confession "made while the accused was under the same influence" as when the first confession was made?

This brings us to a discussion of the second confession and proposition "C" under the first assignment of error, which is:

"Where a confession is involuntarily made as the result of threats there is a presumption that all subsequent confessions are made under the same influence and therefore inadmissible."

Counsel for defendant quotes in his brief under this proposition the rule announced in Wharton on Criminal Evidence (11th Ed. 1935, sec. 601, pg. 998) and it so clearly [fol. 576] states the general rule which is supported by the many cases we have read we quote it, as follows:

"Where a confession has been obtained from the accused by improper inducement, any statement made by him while under that influence is inadmissible, but the question arises as to whether a confession made subsequently to such inadmissible confession is itself admissible. This question, as in the case of any other confession, is one for the judge to decide, and each case must be determined on its own facts. The presumption prevails that the influence of the prior improper inducement continues and that the subsequent confession is a result of the same influence which renders the prior confession inadmissible, and the burden of proof rests upon the prosecution to establish the contrary. Such proof must clearly show, to admit such subsequent confession in evidence, that the impression caused by the improper inducement had been removed

before the subsequent confession was made. The determination of the extent of the influence persisting at the time the subsequent confession is made rests [fol. 577] upon attending circumstances, and the inquiry is whether, considering the degree of intelligence of the prisoner, the nature and degree of the influence and the time intervening between the confessions, it can be said objectively that the confessor was not compelled to confess by reason of the pressure or inducement which motivated him to confess on the prior occasion.

"If the court concludes from all the facts and attendant circumstances that the improper influence had ceased to operate or had been removed, the subsequent confession is admissible. It has also been held, generally, that the influence of the improper inducement is removed where the accused is properly cautioned before the subsequent confession. The warning, however, so given should be explicit, and it ought to be full enough to appraise the accused: (1) That anything that he may say after such warning can be used against him; and (2) that his previous confession, made under improper inducement, cannot be used against him, for it has been well said that 'for want of this information, the accused might think that he could not make his case worse than he had already made it, and [fol. 578] under this impression, might have signed the confession before the magistrate.'"

In 20 American Jurisprudence, beginning with section 480, on page 418, a full discussion with reference to the admissibility as evidence of "confessions," is given. For the sake of brevity we refrain from quoting at length. However, we give the following sections where the rule as applied to the facts here is so clearly stated:

Sec. 486. "In the event there are several confessions by the accused, each relating to the same subject matter, there is no objection to the admission of all of them in evidence, provided they are all voluntary. If there are several confessions some of which are voluntary and some of which are involuntary, the ones made voluntarily are admissible in evidence and the ones made involuntarily are inadmissible; the fact that they all relate to the same subject does not make them

one confession. However, it is obvious that if a confession is obtained under such circumstances or by such methods as to make it involuntary, all subsequent confessions made under the same circumstances or [fol. 579] under the operation of the same influence are involuntary and inadmissible."

Section 487. "If one confession is obtained by such methods as to make it involuntary, all subsequent confessions made while the accused is under the operation of the same influences are also involuntary. It is immaterial, in this connection, what length of time may have elapsed between the two confessions, if there has been no change in the circumstances or situation of the prisoner. Once a confession made under improper influences is obtained, the presumption arises that a subsequent confession of the same crime flows from the same influences, even though made to a different person than the one to whom the first was made. However, a confession otherwise voluntary is not affected by the fact that a previous one was obtained by improper influences if it is shown that these influences are not operating when the later confession is made. In other words, the presumption that a subsequent confession of the same crime flows from the same improper influences which induced a prior confession is [fol. 580] not a conclusive one and may be overcome by proof that the influences present at the prior confession did not operate on the subsequent confession. The evidence to rebut the presumption that the subsequent confession, like the original confession, is involuntary must be presented by the prosecution and must be given at the time the subsequent confession is offered in evidence, provided the court is then cognizant that the accused has made a prior involuntary confession. The evidence to rebut the presumption must be clear and convincing, however. If the facts regarding the securing of an involuntary confession are not known to the court when the later confession is admitted, the evidence must be presented whenever the court becomes cognizant of the former confession, in which event it is for the jury to decide whether the subsequent confession was the result of influence which made the prior one involuntary."

Sec. 500. "Spontaneity is not necessary to the voluntariness of a confession, and in this country it is universally recognized that a confession is not rendered [fol. 581] inadmissible in evidence merely because it was elicited by inquiries and questions addressed to the accused. This rule applies whether the questioning is done by a magistrate, prosecuting attorney, police officer, or private person. In England there seems to be some question whether the mere fact of the interrogation of a prisoner by a police officer will per se render the confession inadmissible because of the inducement resulting from the very nature of the authority exercised by the police officer, assimilating him in this regard to a committing or examining magistrate.

"All courts concede that where a confession is elicited by the questions of a policeman, the fact of its having been so obtained is conceded to be one of the circumstances which is to be taken into account in determining whether the answers of the prisoner were voluntary. In the absence of anything to indicate that the confession was induced by duress, intimidation, or other improper influences, such confession is to be deemed voluntary and admissible, but the [fol. 582] questions may be of such character and propounded under such circumstances and in such a manner as to render the confession inadmissible on the ground of coercion.

"The fact that the confession was made in response to a question assuming the guilt of the accused is not of itself sufficient to exclude it, unless the question was so framed as to trap the accused and inspire hope or fear or was accompanied by menacing circumstances."

Sec. 501. "The mere fact that a confession is made after a prolonged examination of the accused by police officers does not necessarily render the confession inadmissible as evidence against the accused on the theory that it is an involuntary confession. A confession secured in such a manner has been deemed admissible, in the absence of anything to show that actual-compulsion was exercised to obtain the confession. However, the length of the time during which an accused was questioned and the circumstances sur-

rounding the questioning must be taken into consideration. In many instances, confessions made after prolonged examination by police officers have been held inadmissible in view of the facts and circumstances of the particular case."

[fol. 583] Sec. 505. "The question whether a confession, to be voluntary, must have been preceded by a caution or warning as to the accused's right to remain silent depends to a large extent upon whether the confession is a judicial or an extrajudicial one. Apart from statute, the prevailing rule is to the effect that extrajudicial confessions are not rendered inadmissible or involuntary by reason of the failure to caution the accused that he need not talk and that, if he does, what he says will be used against him, even though such confessions are made under oath. According to the generally accepted view, the question whether a person has been duly cautioned before making a statement is a circumstance to be taken into account by the judge in exercising his discretion whether to exclude the statement, but the absence of a caution does not, as a matter of law, make the statement inadmissible. In other words, while a warning may not be decisive or important, it is nevertheless a material circumstance which shows that the confession was voluntary."

See also page 442, sections 515, 516 and 518.

[fol. 584] The main cases relied upon to support the contention of defendants are: *Brown v. Mississippi*, 297 U. S. 278, 80 L. Ed. 682; *Chambers v. Florida*, 309 U. S. 227, 84 L. Ed. 716; *Canty v. Alabama*, 309 U. S. 629, 94 L. Ed. 988; *Vernon v. Alabama*, 313 U. S. 540, 85 L. Ed. 1509; *White v. Texas*, 310 U. S. 530, 84 L. Ed. 1342.

These cases involve appeals from the Supreme Courts of Mississippi, Florida, Alabama, and the Court of Criminal Appeals of the state of Texas. In each instance the decision of the lower court was reversed by the Supreme Court of the United States. We have carefully read and examined the opinions of the Supreme Courts of the different states; *Brown v. Mississippi*, 175 Miss. 542, 158 So. 339, 173 Miss. 563, 161 So. 465; *State v. Chambers*, 136 Fla. 568, 187 So. 156; *Canty v. Alabama*, 238 Ala. 384, 191

So. 260; *Vernon v. Alabama*, 240 Ala. 577, 200 So. 560, 239 Ala. 593, 196 So. 96; *State v. White* 135 Tex. Cr. Rep. 210, 117 S. W. 2d 450, 139 Tex. Cr. Rep. 128 Sw. 2d 51; and of the United States Supreme Court, and the other authorities presented in the briefs.

It has always been the practice of this court to follow the decisions of the Supreme Court of the United States, and especially is this true in cases involving the construction or application of the Constitution of the United States. Our high regard for the decisions of that Court; their eminent fairness and legal learning justifies its recognition as [fol. 585] the highest court in the land. If we were dealing with the first confession in the instant case, as heretofore stated, we would unhesitatingly apply the rule as announced in the *Chambers* case, and immediately reverse this case. But as we read the record here, there is a clear distinction in the facts in the case at bar and the facts in each of the cases above cited.

In those cases, defendants were in each instance given the death penalty. In the instant case a sentence of life imprisonment was imposed. In those cases only one confession had been made, and was relied upon. Here the second confession which was introduced in evidence was made at a time far removed from the first confession, and at a place where the defendant knew that he was secure from violence. He was acquainted with the warden of the penitentiary. He had been confined there on two previous occasions. Upon being asked by the warden if he desired to make a statement, he stated that he did. According to the evidence of the Warden, and others, he was advised of his constitutional rights, and that any statement he made could be used against him, and that it was unnecessary to make any statement unless he desired to do so. The answers which he gave to the questions asked were such as only one who had actually committed the offense could possibly have given. His evidence as to his treatment after arriving at the penitentiary is so palpably false, that it could not [fol. 586] be expected that the jury would believe it in passing upon the question of whether the statement was voluntarily or involuntarily made. A reading of the confession, and the cross examination of defendant in which he states that the party who was questioning him and those present forced him to answer the questions as he did, and his repeated denial that he answered the questions as they were

written, can not but convince any fair-minded person that the defendant was not telling the truth upon the witness stand. The statements which he did make can not but satisfy one that only a person who had committed the crime could have given the details thereof as he gave them. His description of his actions and those of his co-defendant; the action of the deceased and his wife; his manner of shooting deceased through the window, and the shooting of his wife as she ran in the yard; the placing of her body in the house after the striking of her with the axe; the applying of the coal oil to the walls, and the setting fire to the house, all of which coincide with the physical facts, could only have been related in the manner it was by one who was present and committed the act. The answers which he gave could not have been suggested by the one propounding the questions, or any of those present. The very answers themselves fully demonstrate that they were being given freely and voluntarily without fear or influence. There was no reason for him to believe that harm would [fol. 587] come to him if he did not make a statement, and his voluntary confession to the Warden of the penitentiary, whom he knew, when asked if he desired to make a statement and he said he did, is conclusive that he was voluntarily making the same, and that he was not in fear of punishment if he did not make the same.

The confession made at the penitentiary, designated as confession number two and which was admitted in evidence, is as follows:

"I, W. D. Lyons, a negro, at 8:15 o'clock p. m., on this the 23rd day of January, 1940, in the office of Warden J. F. Dunn at the Oklahoma State Penitentiary at McAlester, in the presence of J. F. Dunn, Warden of the Oklahoma State Penitentiary, Mr. Van Raulston, Deputy Sheriff of Choctaw County, Oklahoma, Mr. Roy Marshall, a citizen of Choctaw County, Oklahoma, and a stenographer, do of my own free will and accord, without threat of punishment, duress, fraud, coercion, promise of leniency or of any consideration whatsoever, or reward, do hereby and hereon make the following statement and confession, which statement and confession I swear to be the whole truth, without reservation:

“Interrogatories by Mr. J. F. Dunn:

[fol. 588] “Q. State your name. A. W. D. Lyons.

Q. Where do you live? A. Hugo, Oklahoma.

Q. How long have you lived down there? A. I have lived down there mostly at Fort Towson.

Q. How long have you lived around Fort Towson? A. All my life.

Q. Were you ever convicted of any crime and sent to the penitentiary?”

(Question objected to, objection sustained and the jury admonished not to consider any reference in that statement to previous servitude in the penitentiary.)

“Q. What have you been doing? A. Working most of the time.

Q. Did you know a white man that lived around Sawyer, Oklahoma, by the name of Elmer Rogers? A. I never knew his name was Rogers.

Q. Did you know where he lived? A. Yes, I knew where the house was.

Q. Did you know he was the man that you talked to Vanzell about? A. No, sir.

Q. You had been by his house? A. I had been by his house.

Q. How many times? A. I went back and forth by his house several times.

[fol. 589] Q. Where does Vanzell live? A. Right out of Fort Towson.

Q. Did you see Vanzell on Saturday or Sunday evening before New Years? A. Yes, I saw him at Fort Towson.

Q. Did you talk to him? A. Yes, sir.

Q. What did you say to him? A. I walked up to him and spoke.

Q. What was the conversation? A. He asked me if I had a gun and I told him no.

Q. Then what else was said? A. He told me if I had a gun that he knew where we could make some money.

Q. Then what did you say? A. I told him I could get one.

Q. What else was said? A. He told me to get it and meet him.

Q. To meet him where? A. To start up the branch from Fort Towson.

Q. You knew who you were going to rob—that you were going to rob a man by the name of Rogers, a white man that Saturday evening? A. Yes sir.

Q. He is the man that you and Vanzell agreed to rob on Sunday evening, New Years Eve night? A. Yes sir.

[fol. 590] Q. Where did Vanzell tell you to meet him? A. Straight up the road on the branch from Fort Towson.

Q. What time did you agree to meet him? A. About dusk—on Sunday evening, December 31, 1939.

Q. Where did you go then? A. Stayed around Fort Towson.

Q. What time did you leave there Saturday? A. I stayed there all night.

Q. Did you get the gun then? A. No.

Q. When did you get it? A. Sunday morning.

Q. Did you pass the house that morning to look the situation over? A. No.

Q. When did you pass? A. I don't remember.

Q. Where did you go after you borrowed the gun? A. Over to Bus Fleaks' house.

Q. Did you leave the gun there? A. Yes.

Q. What time did you go back and get it? A. About 3:30 o'clock in the afternoon.

Q. Where did you carry it to? A. Went over to the cafe and then back in the edge of the woods.

Q. Did you meet this other boy like you agreed to meet him? A. Yes, sir.

Q. Was he there? A. I beat him there.

Q. How long did you wait on him? A. About twenty minutes.

[fol. 591] Q. Did you go right direct from there to this house? A. Yes sir.

Q. You both walked up there? A. Yes sir.

Q. Where did you go when you got there? A. To the east window.

Q. Was there a light in the house? A. Yes sir.

Q. Did you look in at the window? A. Yes sir.

Q. You and this other boy, Vanzell, together? A. Yes sir.

Q. Who did you see in there? A. His wife. When we first looked in there we didn't see him but we saw his wife and little baby.

Q. How long did you stand at the window? A. About twenty minutes, I guess.

Q. Did you ever peck on the window to draw attention or anything? A. No, sir.

Q. How long did she stay so you could see her? A. She was sitting on the floor by the heater on the other side of him.

Q. Where was he? A. He was sitting beside the wall on the floor and we couldn't see him.

Q. Did you see the boy? A. Yes sir.

Q. Did you see her take the baby and put it to bed? A. No, sir, I didn't see her put it in the bed.

[fol. 592] Q. Where did you go to? A. No place.

Q. Where did she go with the baby? A. She gave the little baby to him and made up the bed.

Q. Then what happened? A. Then he got up to go to bed.

Q. Did you see her put the little baby in the bed? A. I didn't see her put him in bed.

Q. Did you see her take the little baby out of his arms? A. Yes sir.

Q. And he got up and pulled off his clothes? A. Yes sir.

Q. Did you see him then? A. Yes sir.

Q. What did you do? A. I shot him then as he pulled his clothes off. When he got up from the side of the wall to pull his clothes off, I shot him.

Q. Was the bed close to the window? A. No, sir.

Q. Had the lights been blown out? A. No, sir.

Q. Did he get his pants off? A. Yes, sir.

Q. Then you shot him? A. Yes sir.

Q. Where was this other negro, Vanzell? A. He was standing in front.

Q. What kind of a gun did you have? A. 12 gauge shot gun.

Q. What kind of shells? A. No. 4.

[fol. 593] Q. He was over close to the bed when you shot him? A. He was over close to the window.

Q. How far was he from the window when you fired the shot? A. He was about three feet from the window.

Q. How close did you have the barrel of the gun to the window when you fired? A. About two feet from the window.

Q. You were standing on the outside on the ground? A. Yes sir.

Q. How was he standing? A. Standing sideways to me.

Q. Do you remember what side you shot him in? A. In the left side.

Q. How high up did you shoot him? A. About in the side.

Q. You aimed to shoot him in the heart? A. No.

Q. You just shot him in the left side? A. Yes, sir.

Q. Did he fall? A. Yes, he fell.

Q. Into the floor? A. Yes sir.

Q. Then what did you and this other negro, Vanzell, do? A. Waited until the woman came out.

Q. Waited until the woman came out? A. Yes, waited until the woman came out.

Q. Did you stand right there? A. Yes.

[fol. 594] Q. Did you hear the woman hollering in the house?

A. She didn't holler.

Q. She came running out hollering for help?

A. The little boy and the baby holiered.

Q. What did she say?

A. She didn't holler.

Q. When she came out, did you see her as she came out the door?

A. Yes, she came out the door.

Q. Then what?

A. She came out of the house and came around the house to the back.

Q. Did you go, both of you go, to meet her?

A. Yes sir.

Q. Were you facing her when you shot her?

A. Yes sir.

Q. Did she see you before you shot when she came out?

A. Yes sir.

Q. What did she do?

A. She started to run.

Q. Was she running when she came around the house?

A. Yes.

Q. Was you running around?

A. I walked around—I didn't have far to go.

Q. Were you at the corner of the house?

A. Yes sir.

Q. She didn't have a chance to see you?

A. Yes, she was by the house, there.

Q. Did she turn around?

A. No, she stood there.

Q. Where did you shoot her?

A. In the stomach.

[fol. 595] Q. Her facing you?

A. Yes sir.

Q. How far was she from you?

A. About twelve feet.

Q. She fell?

A. Yes sir.

Q. Did you have any more shells?

A. Yes sir.

Q. How many?

A. Five shells.

Q. Did you re-load your gun again?

A. Yes, I did.

Q. Was it a pump or automatic?

A. A single barrel.

Q. You stopped there and loaded your gun again?

A. Yes, sir.

Q. She fell?

A. Yes sir.

Q. What did she say when she fell?

A. She hollered and fell.

Q. What was she saying when you got the axe?

A. She was sniffing and crying.

Q. Did you or the other boy, Vanzell, hit her with the axe?

A. He, Vanzell hit her.

Q. Where did you get it?

A. Out at the wood pile.

Q. Where did you get that axe?

A. He (Vanzell) had it before she came back around there.

Q. Where was the wood pile?

A. It was northeast of the house.

Q. Are you right sure that he used the axe?

A. Yes sir.

Q. How many times did he hit her?

A. Three times.

[fol. 596] Q. Did you see it?

A. Yes sir.

Q. You were standing right there?

A. Yes sir.

Q. Did one or both of you put her on the porch?

A. We both dragged her up—one on each side of her—ahold of her arms and sides.

Q. You got one arm and he the other?

A. Yes sir.

Q. How close to the porch did you put her?

A. About middle way on the porch—close like to the house.

Q. Was she dead then?

A. Yes sir.

Q. What did you then do?

A. Went in the house.

Q. From the front or back?

A. Front.

Q. What did you then do?

A. Searched his clothes.

Q. Where was he?

A. Laying on the floor.

Q. Did you see anyone else in the house?

A. No, I didn't.

Q. How long were you in the house searching?

A. About five minutes.

Q. How much money was he supposed to have?

A. The other fellow told me about a hundred dollars.

Q. Did he tell you where he got the money?

A. Been gambling out there somewhere.

Q. Then after you searched his clothes, where else did you search?

A. In the dresser.

Q. Where else?

A. That's all.

[fol. 597] Q. Then what happened?

A. We set the house on fire then.

Q. How did you set it on fire?

A. Put coal oil on it.

Q. Which one picked up the lamp?

A. He picked it up and blowed the light out.

Q. You still had the gun in your hand?

A. Yes sir.

Q. You still had your gun when he picked the axe up?

A. Yes.

Q. You re-loaded the gun so that if anyone else should come out you would have killed them too?

A. Yes sir.

Q. After you poured the coal oil on the floor, what happened?

A. Poured it on the paper on the side of the wall.

Q. How many matches did you strike?

A. One match.

Q. How many did he strike?

A. He struck three or four.

Q. How many matches did you strike?

A. I struck three or four but only one match set it.

Q. How many places did you set the house on fire?

A. I set it on the kitchen with those other matches.

Q. How many matches did you strike to set the house on fire?

A. Just struck some searching it.

Q. He poured the coal oil on and you set it on fire?

A. Yes sir.

[fol. 598] Q. Where did you go then?

A. Home.

Q. What did you do with the gun?

A. Took it home with me.

Q. What time did you get home?

A. About 8:30 I guess.

Q. Did you go to bed?

A. Yes sir.

Q. Did you sleep?

A. Yes.

Q. What did you do the next morning?

A. Went to town and came back and went hunting.

Q. With the same gun?

A. Yes.

Q. What did you do with the gun?

A. He came and got it.

Q. Where did you buy the shells?

A. W. A. Hall store.

Q. How much did you give for them?

A. A quarter.

Q. Where did you go after he came and got the gun?

A. I come on back home to Hugo.

Q. When were you arrested?

A. It was over a week after that.

Q. Did you ever see this other negro, Vanzell, any more?

A. I saw him in jail.

Q. Did you talk about this case?

A. Yes, in Fort Towson.

Q. You both agreed not to tell it?

A. Yes sir.

Q. Is this statement you have made true?

A. Yes, sir.

Q. This was made of your own free will and accord?

A. Yes sir.

[fol. 599] Q. Any threats been made on you?

A. No, sir.

Q. This statement and confession has been made by you voluntarily?

A. Yes, sir.

Q. You have absolutely told me the truth?

A. Yes sir, I have.

Q. That's all.

“(Signed) W. D. Lyons.

“Witnesses:

“Van Raulston

“R. H. Marshall

“J. F. Dunn

“State of Oklahoma, Pittsburg County, ss.

“Before me, a notary public in and for the County and State aforesaid, personally appeared before me W. D. Lyons, and acknowledged to me that he made, published and declared, signed and fingerprinted the within and foregoing statement and confession consisting of eleven (11) pages, and that said statement and confession was made by him of his own free will and accord, freely and voluntarily, without threat of promise, reward, leniency or remuneration, on this the 23rd day of January, 1940, in the office of the warden

of the Oklahoma State Penitentiary, at McAlester, Oklahoma

(Signed) John D. Seal, Notary Public. My Com.
exp. Feb. 3rd, 1943." (Seal.)

[fol. 600] The evidence of Warden Dunn with reference to the taking of this confession is as follows:

Q. Your name is Jess Dunn?

A. Yes.

Q. Are you the same witness who testified here yesterday?

A. Yes.

Q. Mr. Dunn, I hand you again State's Exhibit nine and ask you to state what that is.

A. This is a statement that W. D. Lyons made in the warden's office in the Oklahoma State Penitentiary. This is his signature which he written himself. This is his thumb print that he put on there himself.

Q. Is that signature and thumb print on each page?

A. It is on each page of the statement.

Q. Was it signed voluntarily by the defendant, or was he forced to sign it?

A. Absolutely voluntary.

Q. Did you tell him his rights when he signed that statement?

A. I did.

Q. Detail just how the statement came to be signed and the circumstances surrounding it.

A. He and Van Raulston and a boy named Marshall came into my office along, I guess, about nine-thirty in the evening, came in and sat down, and I talked to the boy. I knew him before he came up there. And I asked him had he told the truth about this case, and he said he hadn't. I asked him did he want to tell the truth about [fol. 601] this case, and he said he did. Then I told him his rights in the case. I told him what statement he made would be used against him, and for him not to make a statement unless he voluntarily wanted to and it would be his own free will, and voluntary if he made a statement. Then I asked him did he want to make a statement, and he said he did. And I asked him a few questions, then I called in my secretary and told him that I was going to take down what he said and asked

him did he want to sign it. He said he did. After the statement was taken, he got up and signed those papers and put his thumb print on each page. All voluntary things, and the office was as quiet as this is now. He was as calm and cool as he is now. His treatment in my office was the treatment he has now in this court room.

Q. Where is your office located in the main building there?

A. It is in the northwest corner of the administration building.

Q. How many windows do you have in the office?

A. We have four windows.

Q. Was W. D. Lyons sitting down all the time you were questioning him?

A. Yes, all except one time.

Q. What did he do then?

A. I had got down to the question of where he shot the man. I asked him the question of how far the man was from the window when he shot. He stood up from [fol. 602] his seat and stepped off about two and a half or three feet from the window. I asked him where he shot the man. He put his thumb up there in the left side and said about there, and was just as cool and calm as he is right now.

Q. How long had he been there when you questioned him?

A. Before I taken the statement?

Q. Yes.

A. I will say something like 20 or 30 minutes. We sat and talked before I called my secretary in and had him to take the statement.

Q. He hadn't at that time been placed in a cell, had he?

A. No.

Q. Will you read that statement to the jury, Mr. Dunn.

A. I haven't got my glasses, if you will read it.

Q. Who was present, Mr. Dunn, at the time this statement was read to him?

A. Van Raulston and Mr. Marshall, and the chaplain of the penitentiary.

Q. Were they all present at the time you read the statement to him?

A. They were.

Q. And at the time he signed it?

A. Yes.

Q. And marked it with his thumb print?

A. That is right.

Q. Will it be all right for me to read the statement?

A. I can get some glasses.

Q. I will read it. We now offer this confession in evidence."

[fol. 603] And on cross examination, Mr. Dunn testified:

Q. Mr. Dunn, how long have you been warden of the penitentiary?

A. About four and one-half years. I have been at the penitentiary about ten years.

Q. Are the prison camps in the country under your jurisdiction?

A. Yes.

Q. Do you know of a prison camp in this vicinity near Fort Towson?

A. There was.

Q. At the time immediately prior to your talk to Lyons, were you making an investigation down there?

A. I came to Fort Towson and to Hugo, and made an investigation of the camp.

Q. Prior to the time you talked to W. D. Lyons, is it not true that some members of that camp, some inmates, had been under investigation concerning this same murder?

A. There was.

Q. Mr. Dunn, you say this is verbatim of what Lyons said as the results of your questions?

A. Absolutely.

Q. You didn't mean this preliminary part? 'I, W. D. Lyons, a negro, at 8:15 o'clock P. M., on this the 23rd day of January, 1940.' That wasn't said by him, was it?

A. That was read to him.

Q. This preliminary part, starting: 'I, W. D. Lyons,' and ending 'I swear to be the whole truth, without reservation.'

A. That isn't his language and that part of the state-
[fol. 604] ment was prepared and read to him, and

those questions are his own language of his own answers.

Q. Going back to the last page where it speaks of making this of his own free will and accord, freely and voluntarily, without threat or promise, reward, leniency or remuneration, that is not his language, is it?

A. I asked him those questions myself.

Q. He didn't volunteer the words like 'remuneration,'?

A. I asked him those words and he answered.

Q. Did you ask him if he knew what remuneration meant?

A. I didn't ask him. I never let any prisoner make a statement in my office until I tell him his rights, when there is anything involved in the nature of any crime, that might be where there is a penitentiary offense involved.

Q. If your honor please, I move that the whole thing be stricken from the record. It is not in response to the question of mine at all, but is a voluntary statement from the witness.

The Court: Read the question asked by counsel.

Reporter: Did you ask him if he knew what 'remuneration' meant?

The Court: The answer of the warden would not be in response to the question. The answer to the question would be.

[fol. 605] A. I answered about like that, that I didn't ask him that.

Q. You did not ask him if he knew what the word remuneration meant?

A. No, I didn't.

Q. Did you have in your possession any purported statement made by Lyons prior to this time?

A. I did not.

Q. Did you have in your possession any reports of investigations of this case concerning Lyons?

A. Not concerning Lyons.

Q. Did you know of the facts in the case?

A. I didn't know anything about the facts in the case of Lyons at all.

Q. Did you know anything about the facts of the murder, the burning, and so forth?

A. I had been here and had been to the place, but I didn't know any facts in the case.

Q. As a matter of fact, how many former inmates of the prison farm there had been arrested concerning this case?

A. I would not be able to answer your question. Something like four or five or six possibly. Ma-by more, I don't know.

Q. That had been arrested?

A. They had some of them in jail when I was down there.

Q. You knew nothing of the arrest of this man until you saw him, is that right?

A. I had heard they had him arrested but that was all.

[fol. 606] Q. You hadn't heard that he had made a statement?

A. I had not.

Q. When he came into your office approximately at 9:30 why did you ask him if he wanted to make a statement?

A. Because I had known the boy. He had done time there before.

Q. You asked him whether he wanted to make a statement?

A. I asked him had he told the truth about what happened down there.

Q. In what interest were you asking him that question?

A. Because the interest I wanted to find out if he had anything to do with the case.

Q. A personal interest of yours as a citizen, a warden, as a State officer.

A. I will say as a state official.

Q. Is that a common practice in the penitentiary?

A. Yes.

Q. To ask men brought there if they want to make statements?

A. I think our citizens should be interested in a case like that.

Q. The question I am trying to get you to answer is whether you usually do that?

A. When they are brought to the penitentiary in a case like that I generally help with the case all I can.

Q. You mean a case like that?

A. Yes.

Q. Can you explain what you mean by 'case like that?'

A. I mean a case that was as brutal and as notorious, [fol. 607] and a case where there had been three people murdered and burned. That was my idea as a citizen, to do what I could, not as an official, but as a citizen.

Q. You had not discussed this with anyone prior to this?

A. Only when the boys came in they told me they had Lyons arrested for it.

Q. Did you discuss the question of taking a statement from him with any other officer?

A. No, sir.

Q. Had you talked to Mr. Wheatwood prior to this time about this case?

A. Not about this boy. I had talked to him several times about the case, but not about Lyons.

Q. You hadn't talked to anyone in State official capacity, and I include the county officials concerning a statement?

A. Not about Lyons, but I had talked several times about the case. I had been here two or three different times on this case, but at that time Lyons was not in the picture.

Q. You don't know anything about what had happened to Lyons prior to the time you saw him?

A. I do not.

Q. Can you say now, or could you say then, that he hadn't been subjected to any threats, or violence, prior to that time?

A. I couldn't answer that. I know he wasn't up there.

Q. Do don't know what happened before he got there?

A. I do not.

[fol. 608] Q. In your office I ask you are there bars there?

A. There is.

Q. Do you have handcuffs hanging up on the walls?

— No.

Q. You did not have handcuffs in sight while Lyons was there?

A. There are no handcuffs in my office or even in any office.

Q. You are positive that Mr. Van Raulston did not strike him in your presence?

A. Absolutely not. I don't permit or allow anyone to strike a prisoner in my office.

Q. In your presence, Mr. Van Raulston did not make any threats of any kind?

A. Mr. Van Raulston, I don't think, ever spoke a word. I don't think either of the other gentlemen ever said a word when they came into the office when the boy was making his statement.

Q. All these questions are from you without suggestion from anyone?

A. Absolutely.

Q. The statement was not typed or signed right then, was it?

A. It was taken in shorthand.

Q. And typed out?

A. Yes.

Q. Where was Lyons during the time it was being typed out?

A. He was sitting in my office.

Q. The entire time?

A. He might have got up and went out of the office. I don't remember. Of course, there are two offices, three offices.

[fol. 609] Q. He wasn't taken to a cell?

A. He wasn't taken to the cell until the statement was signed.

Q. He was not taken to the kitchen to eat?

A. I believe he might have gone down there to eat while they were typing. I won't be positive. I think I sent him to get something to eat during the time the statement was being typed, but I won't be positive.

Q. The next question, if you don't mind my going through the question a little better.

A. That is all right.

Q. Did you know whether Lyons had an attorney at the time you talked to him? Did you ask him?

A. He didn't have any attorney at that time.

Q. I notice on page eight, this by you: 'What was she saying when you got the axe.' What prompted you to ask that question? Where did you learn about the axe?

A. I had been down here, as I told you, on three or four different occasions. I had been out to the scene. I knew that I had talked with the boy before the statement was made, as I said before. I talked to him a few minutes and went into the case, and asked him after I had talked to him, did he still want to make a statement, and if so, I would call my secretary. He promptly answered he wanted to tell the truth about it and make it short.

Q. But I mean whether he told you voluntarily any [fol. 610] thing about the axe. Who raised that question?

A. I had talked to him. He told me about the axe before the statement was made.

Q. He had told you about the axe before that?

A. Yes.

Q. These questions here where you, if you know what I mean by leading questions?

A. Yes.

Q. They were not out of your own mind, but would come up from your talk prior to that time?

A. He had outlined the case to me before I called my secretary in to take the statement down. When I got through with him, then I told him: 'W. D., if you want to make a statement I'll call my secretary in and have him take it down if you want to sign the statement, and if you want to tell the truth about the case.'

Q. Did he say he wanted to sign his statement?

A. He said he wanted to tell the truth and would sign the statement.

Q. Was there a suggestion that the fingerprints here be put on it?

A. I always put a finger print on when I put the name of every prisoner of every case that comes.

Q. As a matter of fact, who suggested the fingerprint be put on?

A. That is a matter carried on in the penitentiary. There is no prisoner that ever signs a document of that kind unless he fingerprints it.

[fol. 611] Q. What I am trying to get in this particular case, who suggested to Lyons that he put his finger prints on it?

A. I did when he signed his name. And he has been printed before."

(Objection made, and the ruling of the court: "That will be stricken. That voluntary statement will be stricken.")

"Q. Lyons had given you a coherent story before this was taken down, was that right?

A. Yes.

Q. Why didn't you let him dictate it that way instead of questions and answers? Was there a reason?

A. They didn't have any reason.

Q. But you preferred the question and answer method?

A. I asked him the questions and he answered. I also asked him did he want me to ask the questions or did he want to make the statement himself, and he said go ahead.

Q. That does not appear here.

A. That was before the statement was made.

Q. That was about nine-thirty when the officers brought him in?

A. I wouldn't be positive, between eight and ten, something like that. Ma-by, nine-thirty. I am not positive when the time was. I had been home and came back to the penitentiary.

Q. About how long was this preliminary discussion with him? About ten or fifteen minutes.

Q. And the stenographer was brought in promptly [fol. 612] then?

A. Yes.

Q. And when was the chaplain brought in?

A. He was brought in after the statement was made. Then the statement, the chaplain read the statement to Lyons, and asked Lyons was that statement true and his own words, and he said it was. He asked Lyons if he wanted to sign it and he told him he did. I handed him a pen and he signed the statement.

Q. About what time was this?

A. I guess around nine or nine-thirty. I don't know the exact time it was.

Q. You say it was somewhere between eight or nine-thirty when he was brought in?

A. He was there an hour, or an hour and twenty minutes, I couldn't say.

Q. For the entire transaction, signing and fingerprinting, is what I want to know. I don't care about the times between.

A. I would say it was after nine o'clock when they got through.

Q. He was brought in before nine then?

A. Yes.

Q. If I understood that he was brought in about nine-thirty, then you are not positive?

A. I am not positive just what time he was brought in the office. But it was around between eight and nine or nine-thirty.

Q. And it was approximately how long, an hour, hour and a half, or how long was it that the whole [fol. 613] transaction took place?

A. It took possibly an hour and twenty minutes.

Q. Was Mr. Van Raulston there the whole time?

A. He was.

Q. And Mr. Marshall?

A. He was.

Q. Then what happened after the statement was taken?

A. The statement was typewritten.

Q. After it was signed, then what?

A. He was sent to the cell.

Q. Where was the cell?

A. We have a cell on the fourth floor of the cell house where we keep safe-keeping of prisoners, which the counties built. It does not belong to the penitentiary, and we have cells that we put them in.

Q. And he wasn't by any chance taken to the basement?

A. He was not.

Q. Is there where the death row is, in the basement?

A. The death row is on the first floor.

Q. He was not put in the death row in any of those cells?

A. No, not in there.

Q. And was not taken to a cell where he could see the electric chair?

A. No.

Q. You are positive?

A. I am.

Q. Did you take him to the fourth floor or send him?

A. I sent him by the sergeant.

Q. How many electrocutions have you supervised at this time? Speaking of the time you talked to [fol. 614] W. D. Lyons?

A. I think about fourteen.

Q. About fourteen prior to that time? Did you hold any position before you were warden?

A. I was assistant warden.

Q. Did you handle that as assistant warden?

A. The warden always supervises electrocutions.

Q. And you have had fourteen up to that time?

A. Of mine.

Q. Did you talk about that fact with Lyons?

A. No.

Q. Concerning how many men you had electrocuted?

A. Absolutely not.

Q. You did not?

A. I did not.

Q. Did you at any time threaten Lyons in any manner?

A. As I stated before, I don't threaten any prisoner in asking a statement in a matter like this. I did not.

Q. You answer that you did not.

A. Absolutely.

Q. Did you say anything to him of the possibility of a life sentence?

A. There was not a mention about what he might get, or would get, or otherwise.

Q. No mention made of that?

A. No.

Q. I want to come back to the time you were here investigating. As I understand, you were investigating—just what?

A. The prisoners were under my supervision. They had a camp down here seven or eight miles. I don't [fol. 615] know how far it was to where the camp was,

but only a short distance, and they had some of the boys in jail. I came to look into the matter and see what accusations they had them for, and see if they were mixed up in the deal.

Q. Subsequent to that time was there not a change in the administration of the camp, the officials in charge of the camp?

A. Do you mean before this happened?

Q. Around during that time?

A. There was not at that time.

Q. Was there shortly thereafter?

A. I made one shortly thereafter.

Q. Was there, or was there not, wide newspaper publicity to the effect that inmates of the camp were charged with this murder?

A. There was newspaper publicity. There had been some arrests for it.

Q. Wasn't the newspaper publicity condemning the management, and the arrangement whereby the men got out from the camp?

A. There was.

Q. That was during the time that Lyons was brought to you?

A. That is right."

And on redirect examination:

"Q. Do you ever have prisoners in the camps or in the walls to violate the law?

A. Yes;

[fol. 616] Q. What do you do when they violate the law?

A. They are prosecuted like any other citizens of the United States. I go into the case, or help with the officials, and the county attorney, or whoever it might be.

Q. Do you ever try to conceal violations of the law in your institution by inmates?

A. I do not. I have taken a good many cases to the county attorney and helped him."

And on Re-cross examination:

Q. Do you know Vernon Cheatwood, special investigator for the Governor?

A. Yes.

Q. Do you remember him coming to the penitentiary after W. D. Lyons was incarcerated?

A. I don't remember whether I was there or not when he came.

Q. You know he was there a time or two?

A. He has been to the penitentiary a lot of times.

Q. But after W. D. Lyons was taken there?

A. Yes.

Q. Do you know of him going and talking to W. D. Lyons while he was there?

A. I couldn't say whether he talked to W. D. Lyons or not.

Q. You don't know whether he talked, nor what took place when Cheatwood talked to him; do you?

A. I don't know whether he talked to Lyons or not.

Q. Nor what might have taken place if he did?

[fol. 617] A. I have said that I didn't know whether he talked to Lyons or not.

Q. And are therefore not in a position to know what took place if he did. Is that right?

A. That is right.

In the Chambers case, *supra*, the judgment and sentence was for the death penalty. The decision of the lower court was three to one, Judge Brown dissenting, and the Supreme Court of the United States in giving the facts in the case quote from his able opinion. In his opinion, Justice Black comes to the rightful conclusion that the due process provision of the Fourteenth Amendment to the Constitution of the United States was intended "to guarantee procedural standards adequate and appropriate, then and thereafter, to protect at all times persons charged with, or suspected of crime, by persons holding positions of favor and authority."

We again emphasize that if the State in the instant case had introduced in evidence confession number one, and relied upon the same, following the opinion in the Chambers case, we would unhesitatingly reverse this case. We have referred to the other four cases decided by the Supreme Court of the United States, but the facts in the Chambers case are more nearly parallel to the facts in the case at bar, as to the first confession, and a much stronger case than the others. For the sake of brevity we refrain from a dis-
[fol. 618] cussion of the facts in the other cases. All of

these cases carried with them the death penalty, and in the instant case only a life sentence is involved. This sentence was evidently given by the jury by reason of the circumstances under which confession number one was given, for had they not done so they would evidently have given a death penalty verdict in this case. In making this statement we take into consideration the recognized rule that the question of guilt or innocence should not be considered when deciding as to the admissibility of a statement as voluntary or involuntary.

In an elaborate annotation in 85 A.L.R., beginning on page 870, the question of voluntary and involuntary confessions is fully discussed. As a preliminary to this note, the annotator quoted from the case of *State v. Sherman*, (Montana) 90 Pac. 981, 119 Am. St. Rep. 869, these words:

"In the words of Holloway, J., in *State v. Sherman* (1907) 35 Mont. 512, 90 Pac. 981, 119 Am. St. Rep. 869, it has often been said that 'no subject of the law is in more inextricable confusion than that relating to the admission in evidence of confessions made by one accused of crime.' And the particular question under annotation, involved in the law relating to confessions, is no exception to the statement. In its final analysis the question becomes this: Is an accused person against whom his confession has been admitted in evidence, after preliminary examination into voluntariness by the court, entitled to have the jury instructed, inter alia, that they must determine whether the confession was made voluntarily, and reject it entirely from their consideration if they determine that it was not voluntarily made?

"That question can be conclusively and directly decided only when such an instruction has been requested by the defendant and refused by the court. Unless the state has the right of appeal for error of the court in giving an instruction to which exception has been taken, any method of raising the question except that stated above must necessarily result only in a dictum. Consequently, of the large number of cases in which the question has been discussed and which are included in this annotation, only a part are actual decisions of the question."

The main question then considered in the note is whether the proposition of the confession being voluntary or involuntary is a question of law exclusively to be decided by the court, or a question of fact to be presented to and decided by the jury. With reference to this, the annotator in the note states:

"In twelve states the rule obtaining is that the question whether a confession is voluntary so as to justify its admission in evidence is a matter solely of the admissibility of evidence, and is addressed solely to the court. The jury may hear the evidence in regard to the circumstances under which the confession was obtained, if the court admits it, but only for the purpose of determining whether the defendant made the confession and whether the matter asserted therein is the truth. Thus, the jury may determine the weight to be given to a confession, but they may not reject it as evidence if they believe it to be the truth even though they believe that it was not voluntarily made."

The annotator lists the states as holding that the question as to whether the confession is voluntary or involuntary is exclusively a question of law for the court as Alabama, Colorado, Florida, Illinois, Indiana, Maryland, Minnesota, Mississippi, Montana, New Jersey, North Carolina, and North Dakota. And those holding that it is ultimately [fol. 621] a question for the jury as Arizona, Arkansas, California, District of Columbia, Georgia, Iowa, Kentucky, Massachusetts, Michigan, Nebraska, New Mexico, New York, Pennsylvania, South Carolina, South Dakota, Texas, and Utah. The states considered as being doubtful are Kansas, Maine, Missouri, Nevada, Ohio, Oklahoma, Oregon, Rhode Island, Washington, West Virginia, Wisconsin, Wyoming; and the District of Columbia and the United States.

It will be noted that the State of Oklahoma is listed among the doubtful states.

When the annotator comes to a discussion of the cases from this State, he says:

"Notwithstanding that the question under annotation has never been presented to the Oklahoma Court for a direct decision, there are numerous expressions by the court on the subject. However, because of the

ambiguity of the language used, it cannot be definitely said that the court has adopted one view or the other, although it would seem that the court leans toward the rule that the jury ultimately determines whether a confession is voluntary, and either disregards it or considers it as they determine that question."

After this statement, the following cases from this Court [fol. 622] are cited and quoted from: *Kirk v. Territory* (1900) 10 Okla. 46, 60 Pac. 797; *Berry v. State* (1910) 4 Okla. Cr. 202, 111 Pac. 676, 31 L. R. A. (N. S.) 849; *Mays v. State* (1920) 19 Okla. Cr. 102, 197 Pac. 1064; *Simonson v. State* (1926) 33 Okla. Cr. 113, 242 Pac. 279; *Howington v. State* (1926) 35 Okla. Cr. 352, 250 Pac. 941; *Williams v. State* (1927) 38 Okla. Cr. 1, 258 Pac. 1066; *Edwards v. State* (1930) 46 Okla. Cr. 77, 288 Pac. 359; *Lucas v. State* (1924) 26 Okla. Cr. 23, 221 Pac. 798; *Hix v. State* (1925) 29 Okla. Cr. 20, 232 Pac. 123; *Cooper v. State* (1925) 31 Okla. Cr. 165, 237 Pac. 865.

In addition to these cases, we desire to call attention to the following later cases in which this question has been considered: *Wood v. State*, 72 Okla. Cr. 364, 116 Pac. 2d 729; *Williams v. State*, 65 Okla. Cr. 336, 86 Pac. 2d 1015; *Pressley v. State*, 71 Okla. Cr. 436, 112 Pac. 2d 809.

We have carefully read all of the above cases in order to consider their applicability to the facts in the instant case, and notwithstanding the statement that, "it cannot be definitely said the court has adopted one view or the other," it seems to us that a definite conclusion has been reached and adhered to from the early decision in the *Kirk* case by the Territorial Supreme Court to the last case of *Wood v. State*, supra. As suggested by the annotator in commenting upon one of the cases, there may have been some expressions [fol. 623] that were ambiguous or contradictory, yet a careful reading of all the cases will reveal that this Court has universally followed this rule with reference to the determination of the question of confessions, and as to their admissibility. It is stated briefly in the early case of *Kirk v. Territory*, supra, when the court said:

"We think the correct practice, and the one sustained by sound reason and weight of authority, is that when testimony is offered to prove a confession, and objection is made to the competency of the evidence, the

“court should withdraw the jury, and hear all the evidence offered on the objection, both for and against the competency, and decide the question in the absence of the jury. If the court holds the confessions are not proper to be shown, then no prejudice can result from such action. On the other hand, if the court holds the confessions admissible, then the jury should be recalled; and, if the defendant desires, all the evidence relating to the competency of such confessions, the circumstances under which they were given, the condition of mind of the defendant, and all other facts affecting or tending to affect the weight or credit of such confessions, should be permitted to go to the jury.”

All of the cases above cited and all those decided since the organization of this Court have followed this general rule. It has been the universal practice in this State, when a confession is attempted to be introduced in evidence, and objection is made that the same was not voluntary, the jury is withdrawn and all the evidence surrounding the making of the confession is presented to the Court, out of the presence of the jury, and the Court decides as a matter of law whether the confession was made voluntarily or involuntarily. If it is decided that it was voluntary, it is admitted in evidence. If involuntary, the court denies its right to be admitted. Up to this point, it comes clearly in accord with the states holding that the question is exclusively one of law. But our Court has then said that when the confession is admitted in evidence that all of the facts surrounding the giving of the confession may be presented to the jury, and that when this is done, the Court should instruct the jury upon the question of the confession, and advise them if they find it was not voluntarily made that the same should not by them be considered. In the cases above cited, it has been universally held that the burden of proof is upon the defendant to establish that the confession was involuntary.

In the instant case, the exact procedure outlined in the [fol. 625] above cases was followed. When the confession of defendant made at the penitentiary before the Warden was presented, the trial court excused the jury and heard the evidence of the defendant and of the State with reference to the securing of the confession, both in the jail at Hugo and at the penitentiary. When this hearing had been com-

pleted, the Court decided that the first confession at the jail in Hugo was involuntary and inadmissible, stating as his reason therefor that the evidence revealed that a pan of human bones had been placed in the lap of the defendant. The State had made no attempt to introduce the first confession in evidence, but this testimony was offered by the defendant. The court, after hearing all the evidence decided that confession number two made at the State penitentiary was voluntary and therefore admissible in evidence.

There had been a direct conflict between the testimony of the defendant, and that of the State, the defendant testifying that he had been mistreated before and at the time both confessions were made. This was denied by the officers who were present when the first confession was made, and by the Warden and those present when the second confession was taken. The court then called the jury and permitted the second confession made before the Warden at the penitentiary to be introduced in evidence, and then permitted the defendant to introduce in the presence of the jury all of the evidence with reference to what transpired both before and at the time of the giving of both the first [fol. 626] and second confessions. This for the reason heretofore stated.

The court then followed the procedure outlined in the cases above cited, and gave to the jury instruction No. 8, as follows:

"The State has introduced in evidence before you certain statements claimed to have been made by the defendant after his arrest, and while he was in the custody of the officers of the law, which statements are relied on in part by the State to establish the guilt of the defendant of the offense charged.

"You are instructed that confessions and statements made by one charged with an offense must be carefully scrutinized and received with great caution. Yet when they are made voluntarily and deliberately, such confessions and statements may be considered as evidence for and against the person making them, the same as any other evidence. But if a confession or statement is made by one in custody under such circumstances as show that he was induced to make the same by punishment, intimidation, or threats on the part of the persons

[fol. 627]. who had him in charge, or that show that the confessions and statements were not freely and voluntarily made, then they cannot be considered as evidence against the person making them.

"In this case, if you do not find that the confessions, and statements by the defendant, while in custody, were freely and voluntarily made, and made without punishment, intimidation, or threats on the part of the persons having the defendant in custody, then you must disregard such statements or confessions as affording any evidence against the defendant whatever.

"But the mere fact that the confession or statements, if any were made by the defendant, were made in answer to questions propounded to him while under arrest or in custody, will not be sufficient to exclude such statements or confessions as evidence, or prevent you from considering the same, if the statements, if any, were made freely and voluntarily."

After deciding as a matter of law that confession number two was admissible, the court gave the jury an opportunity to pass upon the question as to whether the facts justified [fol. 628] the finding that it was voluntarily given. Many cases hold that this is not only proper, but that the finding of the jury after such instruction is given is conclusive. See the annotation in 85 A. L. R., page 870, and cases there cited; also 20 Am. Jur. page 453, section 533, et seq.

We have carefully examined defendant's requested instruction No. 2. It presents a request that the jury be instructed that if the confession had been obtained by reason of fear and the conduct of the officers that it would not be a voluntary confession, and should not be considered by them.

This principle was fully presented to the jury in instruction No. 8 hereinbefore quoted. In this connection it may be stated that the court permitted the defendant to introduce all of the evidence surrounding the first confession, giving the jury the opportunity to pass upon the question as to whether the defendant was under fear by reason of any treatment he had received at the time he made either confession number one, when at the jail in Hugo, or confession number two, at the State penitentiary.

Referring to the statement made in Wharton on Criminal Evidence, we find this expression: "But the question arises as to whether a confession made subsequent to such inadmissible confession is itself admissible. This question, as in the case of any other confession, is one for the judge to decide, and each case must be determined on its own facts." [fol. 629] Applying this statement to the facts here, it clearly appears that the second confession was made at a time and under such change of conditions that it was clearly a voluntary one, and any fear that may have existed when the first confession was made had been removed before the second confession was made.

The statement further says: "If the court concludes from all the facts and attendant circumstances that the improper influence had ceased to operate or had been removed, the subsequent confession is admissible." It is evident that the trial court after hearing the evidence out of the presence of the jury came to this conclusion. The fact that the witness Van Raulston was present at the time the second confession was taken was considered in the light of all the evidence heard by the court. The confession itself, which was signed by the defendant, states that the same was made "of my own free will and accord, without threat of punishment, duress, fraud, coercion, promise of leniency, or any consideration whatsoever," and is acknowledged to the same effect before a notary public, who was the Chaplain of the penitentiary. Warden Dunn testified, "I asked did he want to tell the truth about this case, and he said he did. Then I told him his rights in the case. I told him what statement he made would be used against him, and for him not to make a statement unless he voluntarily wanted to and it would be his own free will and [fol. 630] voluntary if he made a statement. Then I asked him did he want to make a statement and he said he did."

Under this evidence, and the evidence of the others present to the same effect, it will readily be observed that the trial court did not err in coming to the conclusion that the State had overcome any presumption that might have prevailed that any previous influence or treatment of defendant existed at the time of the second confession. The contention that Van Raulston was present and participated at the time of the securing of the first confession is not supported by the record. The evidence reveals that he was present during a part of the time defendant was being

questioned, but that he was in and out, attending to his other duties as deputy sheriff, and that he did not participate in the questioning, and knew very little about it. The fact that he had been injured in an automobile accident and was unable to drive refutes the testimony of defendant that he beat him for three hours at McAlester before he made his second confession. He was physically unable to do this. Certainly the conclusion of the trial court was in compliance with the terms of the law as announced in Wharton on Criminal Evidence. In addition to this, the court then submitted to the jury the issue under proper instructions to determine the question of the statement being [fol. 631] voluntarily made, as hereinbefore set forth. The jury under this instruction had the right to consider all of the evidence and the verdict they rendered reveals that they undoubtedly did so.

Counsel in their brief state, after citing a number of cases to substantiate the proposition that when a confession is made under improper influences that the presumption arises as to the subsequent confessions flows from the same influence; that: "It has also been clearly established that this presumption must be overcome before the subsequent confession can be received in evidence."

Admitting this as true, it clearly appears that the State has met this burden as to the second confession. The evidence of the defendant is the only evidence to the contrary. His testimony is contradicted by the physical facts, and by every witness present; and the statement which he makes is so unreasonable that the jury evidently did not believe it. If this be true, it may then be said that the presumption above stated had been overcome.

Counsel then say: "In order for the subsequent confession to be admissible in evidence it must be affirmatively shown that the influence which produced the prior confession has ceased. Evidence to overcome or to rebut this presumption must be very clear, strong and satisfactory; if there is any doubt on this point, the confession must be excluded."

[fol. 632] The evidence of the State, as above related, fully complies with this statement, and the evidence of the defendant himself to a great extent establishes this fact. It is revealed by the record that he had twice prior to this time been confined in the State penitentiary for the commission of a felony. This Court, from long experience

knows that one who has been twice confined in the penitentiary becomes more familiar with the making of statements or confessions, and thereby more able to take care of himself in the making of the same. *King v. State* (Neb.) 187 N. E. 934; *State v. Middleton*, 69 S. C. 72, 48 S. E. 35; *Shepherd v. State*, 31 Neb. 389, 47 N. W. 1118; *People v. Trybus*, 219 N. Y. 18, 113 N. E. 538; *Laughlin v. Commonwealth*, 181 Ky. Law Rep. 640, 34 S. W. 590; *Nix v. State*, 149 Ga. 304, 100 S. E. 197; *Turner v. State*, 72 Tex. Cr. Rep. 649, 163 S. W. 705.

This brings us to the question that: "Statements made to Sheriff Duncan at McAlester should not have been admitted in evidence."

There is not much effort on the part of the defendant to substantiate this assignment of error. It is merely contended that the influence of the prior confession had not been removed at this time, "two or four days later." This witness, Cap Duncan, was employed as a sergeant at the [fol. 633] penitentiary. He had formerly been a sheriff of Choctaw County. He testified that some three or four days after the defendant had been received at the penitentiary, that he and a guard by the name of Bert Crawford, who was acquainted with the defendant, went to his cell and talked with him; that defendant told them that he and Van Bizzell killed the Rogers family by shooting them. No objection or exception was taken to this testimony by defendant. It was never denied by defendant. There is absolutely no proof to show that defendant was in any way mistreated or under any influence or fear at the time of making this statement. It seemed to be clearly voluntary on the part of the defendant to one with whom he was acquainted. Certainly there was no error in the admission of this evidence. In the cases cited by defendant the facts are not applicable to the facts in the instant case.

In his motion for a new trial and in his petition in error filed in this court the defendant did not allege as error the fact that defendant did not have an attorney to represent him in his preliminary examination. In defendant's brief, two statements are made with reference thereto: "On the next day they carried him up on the fourth floor of the penitentiary where he remained until the preliminary hearing. During this time Lyons did not have an attorney to represent him." And: "Nevertheless, W. D. Lyons, [fol. 634] without representation by counsel, was subjected

to a preliminary hearing and was returned to the state penitentiary."

Also in the *Amicus Curiae* brief filed by the American Civil Liberties Union, it is stated: "At no time until after the preliminary hearing did the prisoner, an ignorant Negro boy, have the benefit of counsel."

In neither of the briefs is this proposition discussed, and no authorities are cited in support thereof. The above statements are the only references made thereto. The record does not reveal all that transpired at the time of the preliminary hearing. It reveals that a complete transcript of these proceedings was in the hands of the attorneys for defendant at the trial. Certain parts were read with reference to the introduction of the testimony of a witness who was not present at the trial. By these questions it is revealed that the codefendant, Van Bizzell, had counsel of his own choice, and that this attorney examined the witnesses at the preliminary, for both of the defendants, though he did not represent the defendant. In the absence of the record it is presumed that the proceedings before the magistrate were regular. The questions asked reveal that defendant was informed by the magistrate of his right to have counsel as provided by the statute of this State (Secs. 2793 and 2929, O. S. 1931; Tit. 22 secs. 251 and 464 O. S. Ann. 1941.)

[fol. 635] We presume that for the reasons above stated counsel for defendant did not see proper to introduce in evidence the whole transcript of the proceedings at the preliminary examination and especially that part with reference to the appointment of counsel for defendant. And for the further reason that they concluded that it was not a violation of the Fourteenth Amendment to the Constitution of the United States, the due process clause, for one not to have an attorney appointed to represent him at a preliminary examination. It is only a violation of this provision when counsel is not appointed at the final trial.

The more recent decisions of the Supreme Court of the United States, with which we are sure counsel for defendant is familiar, have dealt with the question of the right of a defendant to the appointment of counsel as provided by the Sixth and Fourteenth Amendments to the Constitution of the United States. These cases fully discuss and give a complete history of these amendments, and of the rules of the common law and its development by the different

states. It is unnecessary to quote from these decisions. They may be read by those who desire. We here cite them: *Powell v. Alabama*, 287 U. S. 45, 77 L. Ed. 158; *Johnson v. Zerbst*, 304 U. S. 458, 82 L. Ed 1461; and *Betts v. Brady*, 316 U. S. 455, 86 L. Ed 1595.

[fol. 636] After a careful reading of these and many other cases, we have come to the conclusion that the due process of law clause is not violated by reason of the fact that counsel was not appointed by the magistrate at the preliminary hearing, and especially where he had able counsel at his trial, and they were given ample opportunity to consult with him freely and plenty of time to prepare his defense.

The record reveals that defendant was charged with the commission of this crime on the 31st day of December, 1939. He was arrested on the 11th day of January, 1940. His preliminary examination was not held until the 28th day of January, 1940. His actual trial was not begun until January 27, 1941. The record reveals that counsel who represented him at the trial filed with the clerk of the court on the 5th day of December, 1940, notice of his intention to prove an alibi at his trial. This was fifty-two days before his trial commenced. His counsel had opportunity to converse with him. The defendant was not rushed into a trial without adequate preparation, but was given a delay of over one year. At the time of his trial, he was represented by able counsel. Every right in this trial was safely guarded. Briefs filed in this case have been elaborate. His case was presented to this Court by able oral arguments by both of the attorneys who represented him at his trial. The trial court gave the defendant every consideration and right to which he was entitled. This record [fol. 637] presents as fair a trial as we have ever observed.

A brief has been filed by the attorneys who represented the defendant at his trial, one of whom was from New York City as a representative of the National Association for the Advancement of Colored People; and able counsel of New York City representing the American Civil Liberties Union have filed a brief *amicus curiae*. We make reference to the same. This brief is short, but emphasizes the questions presented by the brief of the defendant. We refer to some of the statements made therein for the reason that it asserts "the conviction of W. D. Lyons in the court below repre-

sents a flagrant violation of the civil rights of a person accused of crime."

As a basis for this statement, four propositions are urged:

"(1) Apart from the alleged confessions, there is insufficient evidence in the record to base a criminal conviction. We do not believe that this proposition can be open to serious debate in the mind of any conscientious observer."

The record does not bear out this assertion. The evidence introduced at this trial which we have not quoted as to the defendant securing the gun, purchasing the shells, the testimony of the Bal-istic expert, the conduct of the defendant and his presence with the gun in close proximity [fol. 638] to the scene of the homicide both prior to and after the killing as testified to by a number of witnesses, and his statement to Cap Duncan, which is clearly admissible, would be sufficient cause for any jury to convict him of the commission of this crime.

A new trial, as we see it, could have no other outcome than that of finding the defendant guilty, and with a great probability that the result would be that defendant would be given a death penalty sentence, rather than one of life imprisonment.

"(2) The first alleged confession, procured during the night and early morning of January 22-23, 1940, was extorted by use of physical and mental torture deliberately applied by responsible officials of the State of Oklahoma."

This first confession, as has been stated, was not introduced in evidence by the State, and no attempt was made to introduce the same. Our views with reference thereto have been fully stated.

"The third contention has reference to the admission of the second confession, because it was made in the presence of Van Raulston, who, it is claimed, was present when the first confession was obtained. As has been stated, the record does not justify this statement. While present at the time defendant was questioned, he did not participate [fol. 639] therein, and was only present at the jail where

the questioning was in progress. We have heretofore discussed the merits of the second confession.

“(4) At no time until after the preliminary hearing did the prisoner, an ignorant Negro boy, have the benefit of counsel.”

This proposition has been heretofore discussed. The record of the proceedings at the preliminary examination was not introduced in evidence.

The amicus curiae brief in a concise manner follows the argument of defendant's brief, but attempts by argument to infer that the testimony of Hon. Jess Dunn, the Warden of the penitentiary, was untrue and that of the defendant true. This was a question for the court to first decide, and by proper instruction was submitted to the jury for their consideration. The argument that the second confession was prepared “in advance of the meeting” does not seem plausible in view of the testimony of all the witnesses present.

That part of the brief which condemns the placing of the pan of bones in the lap of defendant, and any mistreatment of him by any officer, or permitting the same to be done while in his custody, if such was a fact, meets with our approval. And as heretofore stated, we unhesitatingly condemn such practice, and reiterate that if the first confession had been introduced in evidence by the State, we [fol. 640] would reverse this case for a new trial. But as to the second and third confessions, it is clear to us that any fear under which defendant may have been suffering had been removed and that these confessions and statements were made at a time and place, and under conditions that rendered them purely voluntary.

By reason of its importance, the questions involved, and the fact that it involves the right and liberty of a member of the negro race, who is not only poor but uneducated, has caused us to give this case much painstaking and careful consideration. This Court from its creation and organization, as will be reflected by its decisions, has ever been mindful and zealous in the protection of the rights of the citizens of this State, and especially of those who are poor, indigent and uneducated and often unable to protect themselves. At the same time, we have protected the rights of all the citizens of this great commonwealth, to the end that

the life and liberty of its citizens may ever be guarded from the assassin's hands. This rule applies to the humblest citizen who goes to his meager tenant home in the country side with the members of his family, and to the most wealthy citizen of the State, who resides with his family in a mansion. One's color, race or previous condition of servitude should not deprive him of any right in this Court. Equality before the law has ever been our motto.

[fol. 641] A careful consideration of this record clearly reveals that this defendant deliberately murdered Elmer Rogers and his wife in a cruel and brutal manner on the night of December 31, 1939, and after robbing them, poured coal oil on the walls and set fire to their home, and burned to death their innocent child, who was asleep; and that only by a miraculous escape their other two children were saved. As heretofore stated, a reversal of this case, and the granting of a new trial would in our opinion be of no benefit to this defendant. A new trial, as we see it, could have no other outcome than that of finding the defendant guilty, and with a great probability that the result would be that defendant would be given a death penalty sentence, rather than one of life imprisonment.

We have come to the conclusion that the judgment and sentence of the District Court of Choctaw County should be affirmed, and it is so ordered.

Jones, P. J. and Doyle, J. concur.

[fol. 642] IN THE CRIMINAL COURT OF APPEALS OF OKLAHOMA

[Title omitted]

ORDER EXTENDING TIME—Filed June 11, 1943

Plaintiff in Error is hereby granted ten days additional time within which to file petition for rehearing in the above styled and numbered cause.

Dated this 11th day of June, 1943.

Dick Jones, Presiding Judge.

Attest: — Clerk.

[File endorsement omitted.]

[fol. 643] IN THE CRIMINAL COURT OF APPEALS OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING—Filed June 26, 1943

To the Honorable the Presiding Judge and Associate Judges of the Criminal Court of Appeals of the State of Oklahoma:

Now comes plaintiff in error, W. D. Lyons, within fifteen days and ten days' extension of time granted by the Court after filing of the opinion in the above-entitled case on June 2, 1943, and petitions the Court to grant plaintiff in error a rehearing on the grounds that questions decisive of the case and fully submitted by Counsel in brief and arguments have been overlooked by the Court, and that the decision violates the Constitution and laws of the State of Oklahoma and the Fourteenth Amendment to the United States Constitution, and, that it is in conflict with the controlling decisions of the United States Supreme Court.

I

The Use of the Confessions, Obtained under the Circumstances in this Case, by the Prosecuting Attorney Who Knew of the Circumstances, Is a Denial of Due Process of Law by the State of Oklahoma:

[fol. 644] The statutes of the State of Oklahoma in interpreting what is to be considered due process of law have set forth certain definite requirements as follows:

Section 2765 of the Oklahoma Statutes (1931) requires the defendant in all cases to be taken before a magistrate *without unnecessary delay*.

Section 2760 provides that where the crime is a felony the officer making the arrest must take the defendant to the magistrate issuing the warrant or some other magistrate in the same county.

Plaintiff in error was arrested on January 11, 1940. Instead of following the Oklahoma statutes and taking Lyons before a magistrate, he was taken immediately to the sheriff's office where he was severely beaten. (C. M. 106, 107, 108, 349, 148.)

Eleven days thereafter he received the severe beating and mistreatment leading to the first "confession", which beat-

ing and treatment were condemned both by the trial judge and by this Court. It should be noted that the first "confession" was obtained in the county prosecutor's office, in the court house and on the same floor where the court room is located. Lyons was not brought into the court room before a magistrate. He was carried around the county to different places and then to the penitentiary. Lyons was not returned to the court house to be carried before a magistrate until *after* he had made the other "confession." It is quite obvious that Lyons was taken to the [fol. 645] penitentiary for the purpose of attempting to so change the factual situation as to attempt to bolster another confession. Otherwise he would have been carried before the magistrate before being carried to McAlester.

There is no dispute as to the following facts: Lyons was "arrested" by civilians without a warrant. No warrant appears in the record. Lyons was not formally charged with the crime until his appearance before a magistrate on January 27, 1940. He did not have the advice of counsel until February 4, 1940. *All of the "confessions" were secured prior to that time.* This is the chronology:

Lyons was arrested January 11, 1940 (C. M. 236).
 "Confession" obtained at Hugo morning of January 23, 1940 (313-314).

"Confession" signed 2:00 P. M. Same afternoon (C. M. 129).

"2d. Confession" obtained at McAlester same night (C. M. 130).

"3d. Confession" obtained at McAlester two days later (C. M. 228).

Lyons before magistrate without counsel January 27, 1940 (C. M. 140).

First advice of Counsel on February 4, 1940 (C. M. 369).

[fol. 646] Information filed August 29, 1940 (C. M. 2).

Arraignment December 30, 1940 (C. M. 5).

Trial started January 27, 1941 (C. M. 7).

The confessions were introduced by county prosecutor Horton who was present during the time Lyons was beaten and who in his cross examination at the trial admitted he was present when Lyons was beaten and who likewise knew that the other confessions were obtained before Lyons was

carried before a magistrate and before he had opportunity to secure counsel.

The trial court also was acquainted with the facts that these confessions were obtained before Lyons was carried before a magistrate and in violation of the statutes of Oklahoma. This Court likewise is acquainted with the facts apparent on the face of the record. The failure of the officials of the State of Oklahoma to take the necessary corrective steps to protect the fundamental rights of plaintiff in error to elementary due process of law, as prescribed by the statutes of the State of Oklahoma, is a denial of due process of law as guaranteed by the Fourteenth amendment to the United States Constitution.

The United States Supreme Court in two opinions rendered this year have redefined the meaning of due process of law. In the case of *McNabb v. U. S.*, 87 L. Ed. 579 (decided March 1, 1943), regarding the question concerning the admission of confessions obtained by federal officers, Mr. Justice Frankfurter speaking for the Supreme Court, stated:

[fol. 647] "Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded. For in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them. They subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding. Congress has explicitly commanded that 'It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States Commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial * * *' 18 U. S. C. A. 595, similarly, the Act of June 18, 1934, c. 595, 48 Stat. 1008 300a, authorizing officers of the Federal Bureau of Investigation to make arrests, requires that 'the persons arrested shall be immediately taken be-

fore a committing officer.' Compare also the Act of March 1, 1879, c. 125, 20 Stat. 327, 341, 18 U. S. C. A. [fol. 648] 593, which provides that when arrests are made of persons in the act of operating an illicit distillery, the arrested persons shall be taken forth-with before some judicial officer residing in the county where the arrests were made, or if none, in the county nearest to the place of arrest. Similar legislation, requiring that arrested persons be promptly taken before a committing authority, appears on the statute books of nearly all the states.

"The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefor counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is [fol. 649] therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detention. A statute

carrying such purposes is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application.

"The circumstances in which the statements admitted in evidence against the petitioners were secured [fol. 650] reveal a plain disregard of the duty enjoined by Congress upon Federal law officers. Freeman and Raymond McNabb were arrested in the middle of the night at their home. Instead of being brought before a United States Commissioner or a judicial officer, as the law requires, in order to determine the sufficiency of the justification for their detention, they were put in a barren cell and kept there for fourteen hours. For two days they were subjected to unremitting questioning by numerous officers. Benjamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours. The McNabbs had to submit to all this without the aid of friends or the benefit of counsel. The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress [fol. 651] has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the Federal courts would stultify the policy which Congress has enacted into law."

In the footnote to this portion of the opinion Mr. Justice Frankfurter further refers to the Oklahoma statutes, so that the opinion on this point of the United States Supreme Court is sufficient precedent for interpreting the Oklahoma statutes in the pending case. A similar case is *Anderson v. U. S.*, 87 L. Ed. 589.

In the instant case there is no dispute that Lyons was subjected to intense questioning for hours by several persons prior to the time any of the "confession" were made. In the *McNabb case*, *supra*, two of the petitioners were questioned for two days, and the third petitioner for five

of six hours, all before being taken to a magistrate, Mr. Justice Frankfurter, in the opinion for the Supreme Court, said that the use of these confessions violated the due process clause of the Fifth amendment, for the reason that:

“ * * * The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before [fol. 652] any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law * * * ” (87 L. Ed. 586)

Applying this rule to the admitted facts in the instant case there is a clear duty upon this Court to reverse the conviction, as was done in the *McNabb* case.

II

The “Confessions” Used Were Obtained While Plaintiff in Error Was Still Under the Influence of the Threats and Force Used to Obtain the First “Confession” and the Use of Said “Confessions” Was a Denial of Due Process of Law Guaranteed by the Fourteenth Amendment.

In the opinion of this Court it is stated that “The practice of permitting someone designated as an ‘investigator’, from the Governor’s office, or from any other department, to come in and take charge of an investigation and mistreat a prisoner who is being held by the sheriff of any county should not be tolerated.” Vernie Cheatwood, the investigator in this case, was active from the beginning until the time Lyons went before the magistrate (C. M. 314). His unlawful presence and unlawful influence continued throughout the period between arrest and arraignment.

[fol. 653] Although witnesses for the State deny that Lyons was beaten at McAlester, every State witness denied that Lyons was struck in the County Prosecutor’s office. However, the County Prosecutor in open court admitted the beatings when he said:

“Isn’t it true that after they got through hitting you, as you say, with a strap of leather, and you refused

to answer any questions at all times, *that I made them stop whipping you*, and told them to get out of the room, and I asked you if you wouldn't talk to me alone?" (C. M. 141.)

Further, as to the McAlester confession, it is admitted that the Hugo confession was signed at about 2 o'clock in the afternoon and the McAlester one was obtained the same night. In the meantime Lyons had been without sleep, food or water (C. M. 365). The only completely disinterested witness to the confession, the Chaplain at the penitentiary, was at no time called to the witness stand and no explanation was given for the State's failure to do so.

This Court, in its opinion, points out, on page 7, that Lyons "the next morning was taken to the scene of the crime." All of the evidence in the case points to the fact that Lyons was taken to the scene of the crime on the same morning as the confession was obtained. On page [fol. 654] 15, of the opinion it is pointed out that "Here the second confession which was introduced in evidence, was made at a time far removed from the first confession, and at a place where the defendant knew that he was secure from violence." In the first place, the second confession was not obtained at a time "far removed" from the first confession. The first confession was signed at 2 o'clock in the afternoon (C. M. 295). The second confession was obtained, according to Warden Dunn, on the same day at either 8:15 or 9:30 o'clock (C. M. 201). As to Lyons being in a place where he knew he was secure from violence, there is no evidence whatsoever in the record to demonstrate that Lyons "knew that he was secure from violence." As a matter of fact, Vernie Cheatwood visited Lyons while he was in the penitentiary (C. M. 213), so that Lyons was never free from the influence of Cheatwood until after his preliminary hearing, if at all.

Despite the fact that the Attorney General of the State of Oklahoma and this Court insist on considering Warden Dunn, now deceased, as a completely disinterested witness, the facts in the record demonstrate that Warden Dunn did have interest in this particular case. Warden Dunn admitted that there was quite a bit of publicity after the killings in this case concerning inmates of the State Prison Farm near Hugo. He also admitted that four, five, or six convicts had been arrested, charged with the crime.

and that he had made a personal investigation resulting [fol. 655] in a change of personnel in control of the prison camp (C. M. 202, 211, 212). It should also be noted that although Warden Dunn stated that he did not expect to get a confession out of Lyons, it is nevertheless true that the secretary was present in his office after 9 o'clock at night, obviously quite a time after office hours, and that this secretary took down the "confession."

As to the "confession" to Cap Duncan, no effort was made to show that the influence of the prior "confessions" had been removed. Lyons was still without counsel, had not been before a magistrate and was still in the custody of law enforcement officers. To him Cap Duncan likewise was a law enforcement officer. The influence of Cheatwood was still present and subsequent to that time Cheatwood came to the penitentiary with other officers from Hugo.

It is clear, therefore, that the "confessions" used were obtained while Lyons was still under the influence of the threats and force used to obtain the first "confession." The use of said "confessions" was a denial of due process of law guaranteed by the Fourteenth amendment to the United States Constitution.

III

The Refusal to Grant Plaintiff in Error's Instruction No. 2 is Reversible Error.

[fol. 656] This Court in its opinion pointed out, on page 43, that "counsel in their brief state, after citing a number of cases to substantiate the proposition that when a confession is made under improper influence that the presumption arises as to the subsequent confessions flows from the same influence, that: 'It has also been clearly established that this presumption must be overcome before the subsequent confession can be received in evidence'. Admitting this as true, * * *" Plaintiff in error requested instruction No. 2 as an accurate statement of the very same proposition as advanced by this Court in its opinion. The trial court's instruction did not mention the presumption at all. Plaintiff's requested instruction No. 2 was a request for an instruction on this presumption. The opinion of this Court, as stated above, justifies completely the reasons for granting plaintiff in error's instruction No. 2, and failure to do so is reversible error.

Conclusion

It is respectfully urged that this Court grant a rehearing in this matter, in order that the State of Oklahoma may not be guilty of failure to take the necessary corrective [fol. 657] steps to prevent the denial of due process of law to plaintiff in error.

All of which is respectfully submitted this 24th day of June, 1943.

Stanley D. Belden, Oklahoma City, Oklahoma; Thurgood Marshall, New York, New York, Attorneys for Plaintiff in Error.

Amos T. Hall, Of Counsel.

[File endorsement omitted.]

[fol. 658] IN CRIMINAL COURT OF APPEALS OF OKLAHOMA

ORDER DENYING PETITION FOR REHEARING—Filed July 21, 1943

A-10108—W. D. Lyons vs. State of Oklahoma “Petition for Rehearing denied”.

Barefoot, J.

[File endorsement omitted.]

[fol. 659] [File endorsement omitted]

IN CRIMINAL COURT OF APPEALS OF OKLAHOMA

[Title omitted]

DISSENTING OPINION—Filed August 18, 1943

(On Petition for Rehearing)

Dissenting opinion by JUDGE DOYLE:

The petition for rehearing is in part as follows:

“Section 2760 (22 O. S. 1941 Sec. 176) provides that where the crime is a felony the officer making the arrest must take the defendant to the magistrate issuing the warrant or some other magistrate in the same county.

Plaintiff in error was arrested on January 11, 1940: Instead of following the Oklahoma statutes and taking Lyons before a magistrate, he was taken immediately to the sheriff's office where he was severely beaten. (C. M. 106, 107, 108, 349, 148)

Eleven days thereafter he received the severe beating and mistreatment leading to the first 'confession', which beating and treatment were condemned both by the trial judge and by this Court. It should be noted that the first 'confession' was obtained in the county prosecutor's office, in the court house and on the same floor where the court room is located. Lyons was not brought into the court room before a magistrate. He was carried around the county to different places and then to the penitentiary. Lyons was not returned to the court house to be carried before a magistrate until after he had made the other 'confession'. It is quite obvious that Lyons was taken to [fol. 660] the penitentiary for the purpose of attempting to so change the factual situation as to attempt to bolster another confession. Otherwise he would have been carried before the magistrate before being carried to McAlester.

There is no dispute as to the following facts: Lyons was 'arrested' by civilians without a warrant. No warrant appears in the record. Lyons was not formally charged with the crime until his appearance before a magistrate on January 27, 1940. He did not have the advice of counsel until February 4, 1940. All of the 'confessions' were secured prior to that time. This is the chronology:

Lyons was arrested January 11, 1940 (C. M. 236)

'Confession' obtained at Hugo morning of January 23, 1940 (313-314)

'Confession' signed 2:00 P. M. same afternoon (C. M. 129)

'2d. Confession' obtained at McAlester same night (C. M. 130)

'3d. Confession' obtained at McAlester two days later (C. M. 228)

Lyons before magistrate without counsel January 27, 1940 (C. M. 140)

First advice of Counsel on February 4, 1940 (C. M. 369)

Information filed August 29, 1940 (C. M. 2)

Arraignment December 30, 1940 (C. M. 5)

Trial Started January 27, 1941 (C. M. 7.)

The confessions were introduced by county prosecutor Horton who was present during the time Lyons was beaten and who in his cross examination at the trial admitted he was present when Lyons was beaten and who likewise knew that the other confessions were obtained before Lyons was carried before a magistrate and before he had opportunity to secure counsel.

The trial court also was acquainted with the facts that these confessions were obtained before Lyons was carried before a magistrate and in violation of the statutes of Oklahoma. This Court likewise is acquainted with the facts apparent on the face of the record. The failure of the officials of the State of Oklahoma to take the necessary corrective steps to protect the fundamental rights of plaintiff in error to elementary due process of law, as prescribed by the statutes of the State of Oklahoma, is a denial of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

The United States Supreme Court in two opinions rendered this year have redefined the meaning of due process of law. In the case of *McNabb v. U. S.*, 87 L. Ed. 579 (decided March 1, 1943), regarding the question concerning the admission of confessions obtained by federal officers, Mr. Justice Frankfurter speaking for the Supreme Court, stated: • • •

“The circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon Federal law officers. Freeman and Raymond McNabb were arrested in the middle of the night at their home. Instead of being brought before a United States Commissioner or a judicial officer, as the law requires, in order to determine the sufficiency of the justification for their detention, they were put in a barren cell and kept there for fourteen hours. For two days they were subjected to unremitting questioning by numerous officers. Benjamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours. The McNabbs had to submit to all this without the aid of friends or the benefit of counsel. The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers

and before any order of commitment was made. [fol. 662] Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the Federal courts would stultify the policy which Congress has enacted into law."

It is further stated:

"Mr. Justice Frankfurter, in the opinion for the Supreme Court, said that the use of these confessions violated the due process clause of the Fifth amendment, for the reason that:

"* * * The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.' (87 L. Ed. 586)

Applying this rule to the admitted facts in the instant case there is a clear duty upon this Court to reverse the conviction, as was done in the McNabb case.

It is further stated:

"This Court, in its opinion, points out, on page 7, that Lyons 'the next morning was taken to the scene of the crime'. All the evidence in the case points to the fact that Lyons was taken to the scene of the crime on the same morning as the confession was obtained. On page 15, of the opinion it is pointed out that 'Here the second confession, which was introduced in evidence, [fol. 663] was made at a time far removed from the first confession, and at a place where the defendant knew that he was secure from violence.' In the first place, the second confession was not obtained at a time 'far removed' from the first confession. The first

confession was signed at 2 o'clock in the afternoon. The second confession was obtained, according to Warden Dunn, on the same day at either 8:15 or 9:30 o'clock."

It is further stated:

"As to the 'confession' to Cap Duncan, no effort was made to show that the influence of the prior 'confessions' had been removed. Lyons was still without counsel, had not been before a magistrate and was still in the custody of law enforcement officers. To him Cap Duncan likewise was a law enforcement officer. The influence of Cheatwood was still present and subsequent to that time Cheatwood came to the penitentiary with other officers from Hugo.

It is clear, therefore, that the 'confessions' used where obtained while Lyons was still under the influence of the threats and force used to obtain the first 'confession'. The use of said 'confessions' was a denial of due process of law guaranteed by the Fourteenth amendment to the United States Constitution."

It is further urged that the refusal to give requested Instruction No. 2, is reversible error, for the reason: "This Court in its opinion pointed out, on page 43, that 'counsel in their brief state, after citing a number of cases to substantiate the proposition that when a confession is made under improper influence that the presumption arises as to the subsequent confessions flows from the same influence, that: 'It has also been clearly [fol. 664] established that this presumption must be overcome before the subsequent confession can be received in evidence'. Admitting this as true, * * * Plaintiff in error requested instruction no. 2 as an accurate statement of the very same proposition as advanced by this Court in its opinion. The trial court's instruction did not mention the presumption at all. Plaintiff's requested instruction no. 2 was a request for an instruction on this presumption. The opinion of this Court, as stated above, justifies completely the reasons for granting plaintiff in error's instruction no. 2, and failure to do so is reversible error.

Conclusion

It is respectfully urged that this Court grant a rehearing in this matter, in order that the State of Okla-

~~homa may not be guilty of failure to take the necessary corrective steps to prevent the denial of due process of law to plaintiff in error."~~

The law of the land guarantees to every person charged with crime, whether guilty or innocent, regardless of race or color, whether of high or low degree, whether rich or poor, a fair and impartial trial according to the due and orderly course of the law, and it is a duty resting upon the courts to see that the guaranty of such a trial shall be upheld and sustained.

It is undoubtedly the law that the accused in any criminal action is entitled as a matter of right, to require in the first instance a compliance with the ordinary rules and forms of law that secure to him a fair and legal trial.

Our laws have been made for observance and not for evasion, and it is the duty of trial courts in the administration of the law to see that the accused, whether guilty or innocent, shall have a fair trial according to the due and [fol. 665] orderly course of the law, and this duty is emphasized in a capital case.

It has been well said that the law is not designed to be a swift engine of oppression and vengeance, but it was and is designed to try and convict men only after due hearing and a fair trial.

Under the provisions of the Code of Criminal Procedure. Secs. 2484-2485 C. S. 1921, (22 O. S. 1941 Secs. 251-252, "the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings" and

'he must also allow to the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose'. And, under Section 2590 (22 O. S. 1941 Sec. 464) providing that before arraignment the defendant 'must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desire the aid of counsel. If he desires, and is unable to employ counsel, the court must assign counsel to defend him' Held, that while these rights may be waived by the defendant, they cannot be denied by the courts."

Polk v. State, 26 Okla. Cr. 283, 224 Pac. 194.

The state attempts to safeguard the life and liberty of citizens, and as one of the steps in that direction secures to

them, if prosecuted for crime the constitutional right to be heard by counsel, which includes the right of accused to consult with counsel at every stage of the proceedings, whether imprisoned or admitted to bail.

Mullen v. State, 28, Okla. Cr. 218, 230 P. 285.

In Howington v. State, 30 Okla. Cr. 243, 235 Pac. 931, we said:

"The uniform holding of the courts is that, in capital cases, a plea of guilty can only be entered after the defendant has been fully advised by the court of his rights and the consequences of his plea, and, where it appears—on appeal from a judgment of conviction that the defendant has been denied a right guaranteed by the Constitution, such showing requires a reversal, unless the record clearly shows that the right was waived, or that no injury could have resulted to the accused by reason of such denial.

A denial of a constitutional right to a person prosecuted for a crime is prima facie prejudicial." . . .

"In cases of this kind, where the defendant is charged with a capital offense, he should have the advantage of every right which the law secures to him upon his trial. A fair and impartial administration of justice is one of the most sacred rights of the citizen, and it is the duty of the courts to see that the constitutional rights of the accused shall not be violated; however guilty he may be, he is entitled to a fair trial according to the due and orderly course of the law." In *Exparte Barnett*, 67 Okla. Cr. 300, 94 P. (2nd) 18, this Court held:

"Whether one accused of crime has waived his right to the assistance of counsel for his defense must depend in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Held further:

"Habeas corpus is an available remedy to one who has, without having effectively waived his constitutional right to the assistance of counsel, been convicted and sentenced and to whom expiration of time has rendered relief by an application for a new trial or by appeal unavailable."

[fol. 667] Citing *Powell v. Alabama*, 287 U. S. 45, 77 L. Ed. 158, 84 A. L. R. 527.

Also quoting from the opinion delivered by Mr. Justice Black for the Supreme Court of the United States, in the case of *Johnson v. Zerbst*, 304 U. S. 458, 82 L. Ed. 1461.

In *Miller v. State*, 13 Okla. Cr. 176. 163 Pac. 131, L. R. A. 1917D P. 383, it is said:

"When a prisoner is compelled by duress to make self-disserving statements, such statements cannot be put in evidence against him."

"To render statements made by a prisoner admissible, they must be entirely free and voluntary; that is, must not be abstracted by any sort of threats or violence, nor obtained by any direct or implied promises. It is not important to determine whether they amount to a confession of guilt, or merely declarations of fact tending to show guilt."

The record shows defendant's requested Instruction No. 2 reads:

"Gentlemen: You are instructed that if you find that at the time the confession was obtained at McAlester, that the defendant was still suffering from the treatment that he had received in the County Attorney's office or elsewhere by the officers that had him in custody or was induced to sign the confession by reason of fear as a result of the conduct of the officers that had him in custody and that by reason thereof said confession was not a free and voluntary confession, you are not to consider the confession, or any of the evidence therein contained.

Asked for by the defendant and refused, exception allowed. Geo. R. Childers, Judge.

Endorsed: Filed in Open Court, Choctaw County, Okla., Jan. 30, 1941. Haskell Floyd, Court Clerk."

[fol. 668] The well established rule is that, if a confession has once been obtained through illegal influence, it must be clearly shown that such influence has been removed before a subsequent confession can be received in evidence.

The rule is stated in 20 Am. Jur. Evidence, Sec. 487, as follows:

"Once a confession made under improper influence is obtained, the presumption arises that a subsequent

confession of the same crime flows from the same influences, even though made to a different person than the one to whom the first was made. However, a confession otherwise voluntary is not affected by the fact that a previous one was obtained by improper influence if it is shown that these influences are not operating when the latter confession is made. In other words, the presumption that a subsequent confession of the same crime flows from the same improper influences which induced a prior confession is not a conclusive one and may be overcome by proof that the influences present at the prior confession did not operate on the subsequent confession. The evidence to rebut the presumption that the subsequent confession, like the original confession, is involuntary must be presented by the prosecution and must be given at the time the subsequent confession like the original confession is involuntary must be presented by the prosecution and must be given at the time the subsequent confession is offered in evidence, provided the court is then cognizant that the accused has made a prior involuntary confession. The evidence to rebut the presumption must be clear and convincing, however. If the facts regarding the securing of an involuntary confession are not known to the court when the later confession is admitted, the evidence must be [fol. 669] presented whenever the court becomes cognizant of the former confession, in which event it is for the jury to decide whether the subsequent confession was the result of influence which made the prior one involuntary."

A defendant in a criminal prosecution is entitled to a legal trial, conducted in accordance with the rules of law; and the question of his guilt or innocence should be determined upon legal evidence.

Upon a careful review of the record, the authorities cited in the petition for rehearing, and under all of the decisions of this court, so far as I can recall, I do not believe that the plaintiff in error has been tried and convicted in accordance with law, and did not have that fair and impartial trial which the law guarantees to one charged with crime.

For the reasons indicated in my opinion, the petition for rehearing should be allowed, the judgment of conviction reversed, and the cause remanded to the trial court with direction to grant a new trial.

I therefore enter my dissent from the affirmance of the judgment appealed from.

[fol. 670] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 671] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA
PAUPERIS—November 22, 1943

On Consideration of the motion for leave to proceed herein in forma pauperis.

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 672] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 22, 1943

The petition herein for a writ of certiorari to the Court of Criminal Appeals of the State of Oklahoma is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 673] IN SUPREME COURT OF THE UNITED STATES OF
AMERICA

STIPULATION AS TO ISSUE INVOLVED AND RECORD NECESSARY FOR
CONSIDERATION THEREOF.

In order to simplify the issues involved and avoid the necessity of having printed the entire testimony taken in the above cause and incorporated in the record on file with the Criminal Court of Appeals of the State of Oklahoma it is stipulated and agreed by and between W. D. Lyons, peti-

tioner herein, and the State of Oklahoma, respondent, that the only issue to be presented by petitioner for consideration by the court shall be that of the admissibility in evidence of the confessions of petitioner introduced by the State of Oklahoma and admitted by the trial court, and whether such admission was a denial to petitioner of equal protection and a denial of due process within the meaning of the Fourteenth Amendment to the Constitution of the United States.

In view of the above it is further stipulated and agreed that it shall not be necessary to incorporate in the printed record the testimony of the following witnesses who testified for the State:

[fol. 674] G. C. Campbell, L. B. Mills, Sammie Green, Mrs. W. A. Hall, Hosea Walker, Richard Scott, Lonzo Brown, Alton Rider, Dr. F. L. Waters, W. A. Hall, Curtis Thompson, Dr. E. A. Johnson, Bus Fleeks, Henryetta Butler, Ella Mae Fleeks and C. C. Crabbe.

It is further stipulated that the following facts appear from the testimony so omitted from the printed record.

The deceased, Elmer Rogers, his wife and three children, James Glenn Rogers, 7 years old, Elvie Rogers, 4 years old, and Billie Donald Rogers, a baby, lived in a tenant house a short distance northwest from Fort Towson, Choctaw County, Oklahoma. On the night of the tragedy the father, Elmer Rogers, was pulling off his clothes preparatory to going to bed when a shot came through the window and Elmer Rogers fell. The mother ran out of the house in the direction of the nearest neighbor to the southeast and was shot on the outside of the house. Some one came into the house, put out the lamp and set fire to the door of the room. The seven year old boy escaped with his baby brother. The four year old brother burned to death. The house was destroyed. The undertaker recovered the three bodies. Rogers and his wife had been shot with a shotgun using No. 4 shot, and the bodies had been chopped.

Late in the evening preceding the killing W. D. Lyons, the defendant, was seen carrying two packages wrapped in paper and going towards a bois-d'arc thicket northwest of town. A short time later he was seen coming back carrying a single barrel shotgun. After dark he was seen sitting inside the fence near this bois-d'arc thicket. He was inside

the pasture in which Elmer Rogers lived. He had something lying across his lap. He was about a half mile from the Rogers home. This was about two and a half hours before the witness saw the fire.

[fol. 675] Sammie Green identified the gun as belonging to him. Defendant had borrowed it about nine on the morning of the killing. Witness saw him with the gun late in the evening. It had been taken down and wrapped in newspaper. On Saturday, the day before the killing, defendant bought six shotgun shells, No. 4 shot, at the W. A. Hall store. Defendant and Van Bizzell had been in the store and defendant returned and bought the shells.

Several other witnesses testified to seeing defendant on the evening preceding the killing in the colored section in the northwest part of town and near the bois-d'arc thicket, the defendant carrying the shotgun taken down and wrapped in newspaper. Dr. Waters' and Dr. Johnson's testimony related to the condition of the bodies and nature of the wounds. Curtis Thompson testified to drinking with the defendant on the day of the killing and to seeing the defendant nearly all morning.

C. C. Crabbe, a ballistic expert, testified relative to the shotgun shells found by representatives of the state at the spot indicated and described by the defendant, according to the witness, Floyd Brown, as the place where he had hidden the shells used in the killing of Rogers and his wife. The witness identified these shells as having been fired in the shotgun which the evidence showed to have been borrowed by the defendant from Sammie Green and to have been in the possession of the defendant the night Elmer Rogers and his wife were killed.

Thurgood Marshall, Attorney for W. D. Lyons, Petitioner. Randell S. Cobb, Attorney General of the State of Oklahoma, by Sam H. Lattimore, Assistant Attorney General, Attorney for Respondent.

Endorsed on Cover: Enter Thurgood Marshall in forma pauperis. File No. 47,926. Oklahoma, Criminal Court of Appeals. Term No. 433. W. D. Lyons, Petitioner, vs. The State of Oklahoma. Petition for a writ of certiorari and exhibit thereto. Filed October 18, 1943. Term No. 433, O. T. 1943.



FILE COPY

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APR 7 1944

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 433

W. D. LYONS,

Petitioner,

vs.

THE STATE OF OKLAHOMA.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF OKLAHOMA.**

BRIEF ON BEHALF OF PETITIONER.

✓
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INDEX.

SUBJECT INDEX.

	Page
Opinions below	1
Jurisdiction	2
Statement of the case	2
Statement of facts	2
The "arrest".	3
Events leading up to the confessions	4
First confession	5
Second confession	9
Errors to be urged	13
Argument	13
First confession	15
Second confession	17
Admission to Sheriff Duncan	18
Oklahoma Statutes, 1931	25
Conclusion	29

TABLE OF CASES.

<i>Anderson v. United States</i> , 87 L. Ed. 829	27
<i>Brown v. Mississippi</i> , 297 U. S. 278	15
<i>Canty v. Alabama</i> , 309 U. S. 629	
<i>Chambers v. Florida</i> , 309 U. S. 227	20
<i>2 East Pleas of the Crown</i> 658	21
<i>Fisher v. State</i> , 145 Miss. 116	21
<i>Lisenba v. California</i> , 314 U. S. 219	20
<i>Lomax v. Texas</i> , 313 U. S. 544	
<i>McNabb v. U. S.</i> 318 U. S. 332	25, 27
<i>Reason v. State</i> , 94 Miss. 290	21
<i>State v. Ellis</i> , 294 Mo. 269	19, 22
<i>Vernon v. Alabama</i> , 313 U. S. 547	
<i>Ward v. Texas</i> , 316 U. S. 547	20
<i>White v. Texas</i> , 310 U. S. 530	

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Opinions Below.

No opinion was rendered by the District Court of Choctaw County, Oklahoma, before which Court the case was tried.

The opinion of the Criminal Court of Appeals of the State of Oklahoma appears in the record at pp. 284-337. It is reported in 138 P. (2d) 142. The dissenting opinion to the order denying the Petition for Rehearing appears in the record at pp. 346-355 and is reported in 140 P. (2d) 248.¹

¹ The order denying Petition for Rehearing was signed by only one of the Justices of the Criminal Court of Appeals in Oklahoma without opinion (R. 346).

Jurisdiction.

Certiorari to review the judgment of the Criminal Court of Appeals of the State of Oklahoma entered herein on July 21, 1943, was granted by this Court on November 22, 1943 (R. 355), upon a petition therefore filed on October 18, 1943, and based upon Section 237(b) of the Judicial Code (28 U. S. C. 344).

Statement of the Case.

This action was commenced in the District Court of Choctaw County, State of Oklahoma, on the 24th day of August, 1940, by the filing of an information. This information charged W. D. Lyons and one Van Bizzell jointly with murdering one Elmer Rogers (R. 4-7).

W. D. Lyons was arraigned on December 30, 1940 (R. 8) and on January 27, 1941, a severance was granted and W. D. Lyons was placed on trial (R. 9). He was convicted of murder on January 31, 1941 (R. 272). On February 10 the petitioner filed his motion for new trial (R. 275-277). On the same day the motion for new trial was overruled (R. 277).

On the same day the petitioner was sentenced to life imprisonment (R. 278). On the same day petitioner gave notice in open court of his intention to appeal to the Criminal Court of Appeals (R. 280-281).

Statement of Facts.

Late on the night of December 31, 1939, Elmer Rogers, his wife and one son were brutally murdered in their home near Fort Towson, Oklahoma. Another son, James Glenn Rogers, escaped with his smaller brother, Billie Don. Both Mr. and Mrs. Rogers were shot with a shotgun and the house set afire, burning both of them and one of the young boys.

The crime aroused the entire community and there was much newspaper publicity. Shortly thereafter several white prisoners from a nearby prison camp were arrested for the crime (R. 102-103, 179). This brought about additional publicity condemning the Oklahoma State Prison System (R. 111). Warden Jesse Dunn of the State Prison System was sent to Fort Towson and began a personal investigation of the situation (R. 102 and 111), and shortly thereafter made a change in officials in charge of the prison camp (R. 111).

Vernon Cheatwood, special investigator for the Governor of Oklahoma, was sent to Fort Towson after the convicts from the nearby prison camp had been arrested for the crime (R. 178-179). Vernon Cheatwood had been a special investigator for six or seven years and had much experience in obtaining confessions (R. 177-178). During his investigation the prisoners arrested for the crime were released and W. D. Lyons, a young Negro, was arrested in Hugo, Oklahoma (R. 179).

The "Arrest".

On the night of January 11, 1940, W. D. Lyons left his mother-in-law's home to get a drink of illegal whiskey hidden in the woods and on his way back met Ennis Aikens (R. 208). Aikens, a witness for the State of Oklahoma, testified that he and Lyons saw several cars of police officers drive up to the home of Lyons' mother-in-law and that Lyons requested him to go down to the house and ask his wife "what the trouble was down there" (R. 138). Shortly thereafter Lyons returned to the house and was met by two men with drawn revolvers. Reasor Cain and Oscar Bearden made the "arrest" (R. 127). Reasor Cain at that time was a special officer for the Frisco Railroad but is no longer employed by the Frisco (R. 128). The employment of Oscar Bearden does not appear in the

record. These two men promptly seized Lyons and since they did not have handcuffs they bound his arms behind his back with his belt (R. 129). The men then started toward the jail with Lyons (R. 129).

About three blocks from the court house and jail Reasor Cain broke off a piece of one-inch board lying on the street and Oscar Bearden struck Lyons on the head with this board (R. 30, 209). He then kicked Lyons and threatened his life by telling him they were going to burn him and kill him by degrees unless he "confessed" (R. 30). About a block from the jail they bumped Lyons' head against a tree (R. 30, 209). When they reached the jail the jailor, Leonard Holmes, greeted Lyons by striking him in the mouth with the jail keys which weighed about five pounds (R. 30, 209).

Events Leading Up To The Confessions.

Bearden then told Cain and Holmes to "get some more officers, and we will drag him through 'colored town' and let the rest of the Negroes learn a lesson" (R. 209). Harvey Hawkins returned and reported there were no more officers around at that time. The jailor and Deputy Sheriff Floyd Brown then carried Lyons to the top floor of the women's side of the jail where Floyd Brown kicked him and knocked him down with his fist (R. 209). While on the floor Lyons was kicked in the stomach and ribs by Brown (R. 30-31, 210). Lyons was then placed in a cell.

After about five minutes Lyons was carried downstairs to a small room adjoining the sheriff's office. In this room at the time were the sheriff, two deputy sheriffs, the state ballistic expert, two highway patrolmen, and the state investigator (R. 31). Roy Harmon, sheriff and state's witness, admitted there were at least three or four men in the room besides Lyons (R. 62).

These officers beat Lyons again and bumped his head against the wall. One of the officers made Lyons stand against a wall with his hands stretched above his head while the officer, with cowboy boots on, kicked the skin off the shins of Lyons' legs (R. 32). An investigator kicked him in the stomach and blacked Lyons' eye (R. 32). The local constable also beat him and threatened him in an effort to make him confess (R. 33). The sheriff questioned Lyons for about thirty minutes and then the beatings were resumed until the sheriff stopped them again and had Lyons carried upstairs to a cell (R. 210).

Although the officers denied beating or threatening Lyons, one witness subpoenaed by the State, corroborates Lyons' testimony. She testified that she saw him in the jail at Hugo and noticed that his eye was blackened, his arms were bruised. She testified further that he could hardly walk (R. 87-89).

First Confession.

Eleven days later, about six-thirty in the evening, one of the highway patrolmen and Floyd Brown took Lyons from his cell to the office of the county prosecutor. On the way the highway patrolman struck Lyons on the head with a blackjack (R. 211). Cheatwood met them in the hall and told the officer not to hit Lyons on the head because "I know how to get it out of him when we get him up here" (R. 211). He was then carried to the county prosecutor's office in the court house.

Sheriff Roy Harmon testified the room was about 14 or 16 feet square (R. 63). According to the testimony of witnesses for the State of Oklahoma, from time to time during the night there were at least twelve men in that room. They were the following:

1. Floyd Brown (R. 63, 68, 156).
2. Roy Harmon (R. 59, 68, 72, 130).
3. Van Raulston (R. 114).

4. Vernon Cheatwood (R. 64, 130, 156).
5. Harvey Hawkins (R. 63, 68, 72, 74, 130, 643).
6. Other highway patrolman (R. 63, 130).
7. County Prosecutor Norman Horton (R. 63, 72).
8. Assistant Prosecutor (R. 63, 130).
9. Reasor Cain (R. 130).
10. Howard Rorie (R. 68).
11. "Mr. Holmes" (R. 68).
12. Jess Faulkner (R. 136).

Lyons was handcuffed and put in a chair while Vernon Cheatwood with a blackjack in his hands sat in a chair directly in front of Lyons and about eight or ten inches from him. One of the highway patrolmen was sitting on one side of Lyons with Reasor Cain standing behind him (R. 211). The County Prosecutor was asking the questions (R. 211).

During the questioning Vernon Cheatwood was beating Lyons on the knees, hands, arms and legs with a blackjack. This weapon was described by Lyons as "about two inches wide and about three-fourths of an inch thick on the end, and about a foot and a half long, and every time he hit me with it something in it would rattle like buck shot or steel balls" (R. 211). Every now and then Reasor Cain would strike Lyons with his fist. Lyons also testified that "when Mr. Reasor Cain got tired the highway patrolmen would take it awhile, about an hour and a half to two hours each, and they beat me that way all night and yelling questions . . . they would say, 'You killed those people, didn't you? You God damned black son-of-a-bitch, you are going to tell me before we turn you loose' . . . He said I was going to sing a different song before forty-eight hours from now" (R. 212).

Cheatwood, Cain and now and then the highway patrolmen, would take Lyons out of the chair and bend him across a table while Cheatwood beat him on the back of the head with the blackjack. Then they would put Lyons back in

the chair and start beating him on the legs and arms again (R. 212). Cheatwood also threatened "to stick red-hot irons" to Lyons to make him confess (R. 36).

About two-thirty in the morning the officers brought in a pan of bones and placed them in Lyons' lap. The use of the bones from the bodies of the dead people was freely admitted by officers of the State of Oklahoma (R. 73, 174, 175). The effect of this on Lyons was explained by him in the following testimony: "They said they was the bones of Mrs. Rogers, Mr. Rogers and the baby; and I had never seen any bones of a dead person before, had I ever seen dead people before, and was I afraid of those bones on my lap in the pan. Mr. Cheatwood would lay the ones on my hands, such as teeth and body bones, and make me hold it and look at it, wouldn't let me turn my head away, and beat me on the hands and knees" (R. 213). These officers continued to question and beat Lyons until about four-thirty the next morning (R. 38). At about this time Lyons made a "confession" because they "beat me and beat me until I couldn't stand no more, until I gave in to them and answered the questions that they demanded" (R. 38). Even then he denied killing Elmer Rogers but later answered the question "yes" because "I was forced to . . . I was beat with a blackjack, tortured all night long—because I feared I would get some more torture" (R. 39).

Then Lyons was lifted from the chair and led downstairs and over to the jail where he remained about five minutes after which time three of the officers brought him back to the sheriff's office (R. 39-40). He was held there while the officers ate their breakfast and was then carried to the scene of the crime in Fort Towson (R. 40).

In the car with Lyons were one of the highway patrolmen, Floyd Brown, the assistant prosecuting attorney and Vernon Cheatwood (R. 40-41). During the trip to Fort Towson the highway patrolman and Cheatwood threatened Lyons

(R. 41).. Cheatwood told Lyons they were taking him to Fort Towson to kill him and he should say his prayers (R. 41).

At the scene of the crime Floyd Brown and Harvey Hawkins threatened to burn him and beat him with a pick hammer if he did not do as they told him (R. 42). Lyons was standing facing a fire that had been built and with his back to the officers Brown and Hawkins. When he turned around Hawkins had an axe in his hand saying that Lyons knew something about it. They threatened to torture him again if he did not say he had had the axe (R. 44).

In the meantime Cheatwood and the assistant prosecutor went to the home of the family of Mrs. Rogers. E. O. Colclasure, father of Mrs. Rogers, testified that Cheatwood showed him a blackjack and told him "I beat that boy last night for, I think, six—either six or seven hours . . . I haven't even got to go to bed last night" (R. 262). Mrs. Vernon Colclasure, sister-in-law of Mrs. Rogers testified that Cheatwood showed her the blackjack also and stated he beat Lyons "from his knees on down" (R. 260).

Cheatwood and the assistant prosecutor returned to the scene of the crime with Vernon Colclasure. In the presence of these people Harvey Hawkins asked Lyons if he had not hidden the axe where it was found. Lyons denied that he knew about the axe (R. 216).

Cheatwood asked Lyons to show him where he had been hunting on the day prior to the murder. Lyons took them about a half a mile southeast from the scene of the murder and showed them where he had been shooting while hunting and also showed them where he had discarded some empty shells from his shotgun. (R. 216-217).

Lyons was returned to the jail around 8:30 in the morning and he was again placed in the women's side of the jail. At this time his eye was still closed, his lip broken and his

nose was bleeding (R. 218). At about 2 o'clock in the same afternoon the assistant county attorney, a Mr. Haskell, with two highway patrolmen and Vernon Cheatwood brought Lyons a paper to be signed. Lyons asked what the paper was and Cheatwood said "never mind", whereupon Lyons signed the paper (R. 218). During this entire period Lyons did not have a lawyer to consult nor had any lawyer been appointed to defend him or to protect his rights (R. 218).

● *Second Confession.*

About fifteen minutes later Cheatwood and the Sheriff carried Lyons to the front of the jail where pictures were taken. Immediately thereafter, on the same day, Reasor Cain and Floyd Brown placed Lyons in an automobile and carried him to the Antlers, Oklahoma, jail where they arrived at about 4 o'clock in the afternoon (R. 219).

Cheatwood, the Governor's special investigator, returned to the Webb Hotel in Hugo and in the presence of people sitting in the lobby told the porter to "go up to my room and get me my nigger beater" (R. 256). The porter went to the room and brought back a blackjack. Whereupon Cheatwood stated: "This is what I beat the nigger boy's head with" (R. 257). Cheatwood also described the blackjack to the clerk of the Webb Hotel (R. 258). On the night prior to the trial in this case Cheatwood suggested to the clerk that he forget what he had said to him about the blackjack (R. 258).

About sundown Deputy Sheriff Van Raulston and Roy Marshall took Lyons from the jail at Antlers and carried him to the penitentiary at McAlester, Oklahoma. During the trip Deputy Sheriff Van Raulston continued to threaten Lyons and stated "We ought to hang and bury him right here". Van Raulston also explained that they could tell the courts Lyons had attempted to run away and nobody would do anything about it (R. 219).

As soon as they arrived at the penitentiary Warden Jesse Dunn was summoned and Lyons was carried to the Warden's office. This was about 10 or 10:30 the night of the same day Lyons made his "confession" at Hugo (R. 116, 117, 170, 220). Warden Dunn asked Van Raulston whether "that is the nigger that did the shooting" (R. 220). Van Raulston replied, "He has already admitted some in the confession in the jail house". When Warden Dunn asked Lyons about the murders and Lyons told him he did not know anything about them both Warden Dunn and Deputy Sheriff Van Raulston questioned Lyons for about two hours and Lyons continued to deny that he knew anything about the murders. Whereupon Deputy Sheriff Van Raulston said, "I will make him talk" (R. 220). Van Raulston took a blackjack out of a desk and started beating Lyons on his knees, hands, legs and shoulders. He continued to beat Lyons and threatened him for about an hour and a half or two hours (R. 221).

After this continued beating Lyons answered the questions as he was instructed to answer them. Lyons made these statements "Because I couldn't stand any more of the beating" (R. 221). A stenographer was called in who took down the alleged statement. Warden Dunn and Deputy Sheriff Van Raulston talked in a mumbling, low tone to the stenographer while Lyons merely nodded his head. Lyons had been without drinking water since about 12 noon of the same day and asked the Warden for water (R. 221). After this was completed Lyons was taken to the kitchen to eat. Lyons was returned to the Warden's office where the "confession" was signed. The Warden then told one of the guards to take Lyons to the basement. He was then placed in a cell about 15 feet from the electric chair. Prior to this time Warden Dunn had threatened Lyons by telling him how many men he had sent to death in the electric chair during the time he was Warden (R. 223). Lyons spent the

entire night in the death cell (R. 2-3). On the next day they carried him up on the fourth floor of the penitentiary where he remained until the preliminary hearing. During this time Lyons did not have an attorney to represent him (R. 106).

During the time Lyons was confined to the penitentiary Cheatwood visited him several times (R. 112).

Two or three days after Lyons was placed in the penitentiary Sheriff Cap Duncan, who at that time was a sergeant of the Guard in the penitentiary talked to Lyons in his cell and it is alleged that Lyons admitted to him that he and Van Bizzell killed the Rogers family (R. 124-125).

On Saturday, January 27, Reasor Cain, Van Raulston and Vernon Cheatwood carried Lyons into the Warden's office with two penitentiary guards. Cheatwood placed handcuffs on Lyons and asked him whether or not he was going to get on the stand at his preliminary hearing and swear that he and Van Bizzell killed the Rogers family. When Lyons told him he would not do this Cheatwood began beating him again with a blackjack until Lyons stated he would get on the stand and admit the murders (R. 223-225). Lyons was then carried back to Hugo for preliminary hearing.

Sheriff Roy Harmon told Lyons that they were afraid of mob action and that the National Guard had been called out for the preliminary hearing (R. 68). At the preliminary hearing two local attorneys appointed by the Court to defend Lyons refused to act and were excused by the court (R. 91). Nevertheless, W. D. Lyons, without representation by counsel, was subjected to a preliminary hearing (R. 21) and was returned to the State Penitentiary.

With the exception of the confessions the only evidence produced by the State was that: (a) Lyons was carrying a 12-gauge shot gun wrapped in newspaper in the colored section of Fort Towson on the day of the murder; (b) that

he purchased six number 4 shot gun shells from the local store on the day of the murder; (c) that Mr. and Mrs. Rogers were killed with number 4 shot from a 12-gauge shot gun; (d) officers testified that on the morning of the confession Lyons pointed out a spot at the scene of the crime where an axe was buried.

Lyons admitted he had borrowed a 12-gauge shot gun on that day for the purpose of hunting and that he purchased some shells (R. 205). Lyons had bought shells at the same store several times before. He carried the gun wrapped in newspaper while in town because he did not have a hunting license (R. 206).

On the day following the murders Lyons went hunting about a half-mile from where the Rogers home had been (R. 205-207). Lyons shot twice at a rabbit and missed. He left the empty shells on the ground (R. 206). The gun Lyons borrowed was broken and the trigger would not stay cocked so that the hammer had to be released at the same time the trigger was pulled.

Lyons denied that he pointed out the spot where the axe was supposed to have been buried (R. 216). Clarence Keyes, who was a deputy sheriff at the time of the crime, testified that immediately after the crime was committed the grounds were carefully raked in search of the axe used in the murder and that no axe was on the ground at that time nor at any place under the soil close enough to be reached by the rake (R. 195-200).

Errors to Be Urged.

I.

THE CONVICTION OF PETITIONER BY MEANS OF CONFESSIONS OBTAINED BY COERCION AND OTHER ILLEGAL METHODS WAS A DENIAL OF DUE PROCESS WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II.

THE CONVICTION OF PETITIONER BY MEANS OF EVIDENCE OBTAINED IN DISREGARD OF THE LAWS OF THE STATE OF OKLAHOMA AND REFUSAL OF THE COURTS TO SUPPLY ANY CORRECTIVE PROCESS WAS A DENIAL OF THE EQUAL PROTECTION OF ITS LAWS AND A DENIAL OF DUE PROCESS WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT.

I.

The conviction of petitioner by means of confessions obtained by coercion and other illegal methods was a denial of due process within the meaning of the Fourteenth Amendment to the Constitution of the United States.

The entire case of the State of Oklahoma against the petitioner rested upon an alleged confession and an alleged admission while at the State Penitentiary. The only material evidence other than the confessions is that the petitioner borrowed a shot gun, purchased some shells and was hunting with a 12-gauge shot gun near the scene of the crime on the morning preceding the killing. This was freely admitted by the petitioner as well as the fact that he was also hunting in the same vicinity on the day after the crime was committed. The other evidence is that the

deceased was killed by shot from a 12-gauge shot gun.² Empty shells admittedly dropped by petitioner during his hunting were fired from the same gun used by petitioner while hunting. The testimony that petitioner on the morning of the confession pointed out to state officials where he hid the axe was denied by petitioner. The former deputy sheriff of Choctaw County testified that shortly after the crime had been committed; all of the ground was raked in search of an axe and that no axe had been found on the scene at that time.

It is apparent from the record in this case that there were two confessions. One made at Hugo, Oklahoma, at about 4:30 in the morning of January 23, 1940 (R. 38), hereinafter referred to as the "first confession"; the other at the penitentiary at McAlester some time before 11:00 o'clock on the night of the same day (R. 50), hereinafter referred to as "second confession". The prosecution, realizing the clear inadmissibility of the first confession, sought to introduce in evidence the second confession. Objection to the introduction of this confession was promptly made and the jury excluded. After hearing evidence on the admissibility of the confession the trial judge refused to admit the first confession in evidence on the ground that: "The defendant may have been frightened into making the confession that was made here in the court house, by long hours of questioning and by placing bones of the purported bodies of the deceased persons in his lap during the questioning" (R. 89).

The Court, however, admitted into evidence the second confession over the objection of the petitioner (R. 90). The prejudicial error of the Court's ruling admitting the second confession is apparent from the statement of the judge,

² It was obviously impossible to connect the shot which killed the deceased with the gun carried by the defendant.

made later in the trial in commenting upon the second confession: "They were permitted to bring it out for this purpose: They contended that the defendant was still seared when we went to Oklahoma City. *The Court was of the opinion that several days had elapsed.* At the time, it was not made clear to the Court that both confessions were made on the same day, as I get it now." (Italics ours) (R. 231).

First Confession.

The participation of the State of Oklahoma in the denial of due process to the petitioner is clearer in this record than in many similar cases. As a result of tremendous newspaper publicity brought about by the arrest of certain convicts of a nearby prison camp, Warden Jess Dunn was rushed to the scene (R. 111). The Governor sent one of his best investigators to the scene at about the same time. After the arrival of the Governor's investigator, Vernon Cheatwood, the prisoners from the convict camp were released and W. D. Lyons was arrested (R. 179). Cheatwood remained in the case until after the conviction of Lyons.

It is admitted that the first confession was secured in the court house itself and it is also admitted that officials of the State of Oklahoma brought in the bones of the deceased persons who had been dead for twenty-two days, and placed them in the lap of the petitioner while he was being questioned over a long period of time in the court house (R. 182-183). This action on the part of officials of the State of Oklahoma, admitted by them to be true, will forever remain a disgrace to law enforcement in the United States. Such action is in direct violation of the principle established by this Court in the case of *Brown v. Mississippi*:³ " * * * The rack and torture chamber may not be substituted for the witness stand * * * "

³ 297 U. S. 278, 285 (1936).

The petitioner testified as to the threats, coercion and beating he received at the hands of the officials of the State of Oklahoma prior to his confession (R. 26-57). Although all of the witnesses for the prosecution denied any beating of the petitioner, the county prosecutor in his opening statement admitted: "and that after this defendant, W. D. Lyons, was questioned for long hours about this transaction, he finally admitted that he and Van Bizzell killed those people" (R. 12). During the examination of Lyons by the county prosecutor the following admissions were made:

"Q. I wasn't there in the office until six thirty was I, when they beat you? Isn't it true that Vernon Cheatwood had a strap of leather, and was tapping you like that, and because you refused to answer questions they put to you?

"By Mr. Belden: We object to the attempt to intimidate the witness.

"By the Court: Don't intimidate the witness, just the ordinary tone of voice.

"A. That blackjack he had was loaded.

"Q. How do you know it was loaded? You were insolent to the officers, and sat and sulked when I asked you questions, isn't that true?

"A. No sir.

"Q. You say they kept you in the office until four-thirty the next morning?

"A. That is right.

"Q. And beat you?

"A. That is right.

"Q. Isn't it true that you refused to answer, and they struck you on the knee with a piece of leather?

"A. They struck me all night. I didn't rest any" (R. 55).

Mr. Horton also made the following statement during the same cross-examination:

"Isn't it true that after they got through hitting you, as you say, with a strap of leather, and you refused to

answer any questions at all times, that I made them stop whipping you, and told them to get out of the room, and I asked you if you wouldn't talk to me alone? Is that right?" (R. 56).

Second Confession.

Deputy Sheriff Van Raulston was one of two men who carried the petitioner to the State Penitentiary where the second confession was obtained on the same night (R. 50). Van Raulston admitted that he was present in the county attorney's office during part of the time preceding the obtaining of the first confession and during the time petitioner was being questioned (R. 114). Petitioner testified that Van Raulston beat him prior to the making of the second confession (R. 48-50).

Petitioner had no sleep between Sunday night and Tuesday night, the night of the second confession (R. 50). Lyons testified:

"He beat me awhile longer, until I couldn't stand any more, I was already hurting from—already hurting from that last night beating. I hadn't had any sleep since that Sunday night. It was Tuesday night then. Mr. Van Raulston asked me was I ready to answer his questions? and I told him yes, and Mr. Dunn he sent and got a stenographer and Mr. Dunn and Mr. Van Raulston was telling me how the crime happened" (R. 50).

In an effort to bolster the second confession, Van Raulston testified that he had recently been in an automobile accident and was physically unable to beat petitioner. If it were true that Van Raulston was unable physically to beat petitioner or to protect himself, it is unbelievable that such an officer would be entrusted with the duty of transporting a man charged with a triple murder from one county into another county in an automobile.

It should also be noted that the Chaplain of the State Penitentiary, who was a witness to the second confession

and who was the only completely disinterested person present, was not produced at the trial.

Admission to Sheriff Duncan.

Sheriff Duncan, at that time a sergeant at the Oklahoma State Penitentiary, a few days after the second confession, testified that he secured from Lyons an admission that Lyons had killed the deceased (R. 124-126). This alleged admission was made while the petitioner was still under the influence of prior intimidation, coercion and beating, which intimidation continued up to the time of the arraignment.⁴ No further effort was made by the prosecution to show that the influence prior to the first and second confessions had been removed at this time, two or four days thereafter.

Petitioner testified as to the long period of questioning, threatening, and beatings on the night of January 22 and morning of January 23 prior to the first confession. According to the testimony of witnesses for the prosecution there were at least twelve officers and individuals in the room during this period. The prosecution only called four of these persons. Each of these men testified that they were not in the room during the entire time Lyons was there and therefore they could only testify as to what happened while they were in the room. It seems that the only person present the entire time, with the exception of Lyons, was Vernon Cheatwood and it is significant that he was not called to the witness stand by the prosecution during the time the question of the admissibility of the confession was being considered.

Aside from the beatings during the hours preceding the confession, the act of placing the bones from Mr. and Mrs. Rogers' bodies on Lyons' lap and forcing him to pick them

⁴ On the morning of the preliminary hearing Cheatwood again beat Lyons demanding that he plead guilty (R. 53).

up was sufficient not only to frighten Lyons into a "confession" but also to have a sufficient lasting effect to carry over to subsequent "confessions". This act was admitted by all of the witnesses for the prosecution who were present on the morning of the first confession.

No effort was made by the prosecution to explain how the bones of Mr. and Mrs. Rogers were obtained. It must be noted, however, that these bones were produced twenty-two days after these people were dead and certainly past the time when the bodies should have been buried.

Diligent research has revealed no case as gruesome as this one. The nearest case on this point is *State v. Ellis*,⁵ where the accused was taken to the morgue and forced to put his hand on the deceased. In the *Ellis* case, as in the instant case, the prosecution made no effort to introduce the first confession but introduced a second confession made to the warden of the jail on the next day. The admission of the second confession was held to be error and the conviction reversed by an opinion, part of which stated:

"A prisoner, who had been thus subjected to such rigid inquiry with violence to his person; who had witnessed the gruesome and uncanny scenes mentioned and to whom food and sleep had been denied for so long, would not immediately thereafter be freed from the dominating influences of his experience, and a confession shortly after such treatment had ceased would, in the absence of proof to the contrary, be adjudged involuntary."⁶

The prosecution at no time during the trial of this case made any effort whatsoever to overcome the presumption that the influences which brought about the first confession continued up to the time the second confession was made at

⁵ 294 Mo. 269 (1922).

⁶ 294 Mo. 269, 283.

McAlester, the statements were made to Sheriff Duncan, and the preliminary arraignment.

Although Deputy Sheriff Van Raulston, who was present when the first confession was obtained, and Roy Marshall, who accompanied Van Raulston on the trip to McAlester with Lyons, denied beating Lyons or threatening him prior to the second confession, no effort was made by either of them to give any affirmative evidence to overcome the presumption of the continuation of the influences which brought about the first confession.

Warden Jesse Dunn, who is alleged to have taken the confession at McAlester, was not placed on the witness stand at this time. It is peculiarly significant that the only completely disinterested witness to this confession, the Chaplain at the penitentiary, was at no time called to the witness stand by the prosecution.

This Court has repeatedly set aside convictions based upon confessions secured by protracted and repeated questioning as well as instances of brutality similar to the instant case.⁷ In an effort to circumvent this line of decisions the State of Oklahoma, while refusing to introduce in evidence the first confession, introduced a second confession and an alleged admission made subsequent to the first confession.

Many years ago the principle was established that where a confession is obtained by such methods as to make it involuntary, all subsequent confessions made while the accused is under the operation of the same influence are likewise involuntary.

"When a prisoner has been once induced to confess upon a promise or threat, it is a common practice to

⁷ *Lisenba v. California*, 314 U. S. 219, 239, 240, 86 L. ed. 166, 181, 182 (1941).

Ward v. Texas, 316 U. S. 547, 555, 86 L. ed. 1663 (1942).

Chambers v. Florida, 309 U. S. 227, 84 L. ed. 716 (1940).

reject any subsequent confession of the same or like facts, though at a subsequent time."⁸

In the United States a long line of decisions of state courts has firmly established the same principle as to subsequent confessions where the first is involuntary. There are two cases in which the facts are peculiarly close to the facts in the instant case.

In a Mississippi case there was evidence of brutality in securing a confession by use of "the water cure". The court excluded the confession made to the officer who administered "the water cure" but admitted other confessions and statements made after the first confession was made. The Mississippi Court reversed this conviction stating:

"It clearly appears in the case before us that the original confession in the jail was secured by force and in violation of the law. . . . It is impossible for the reasoning mind to ignore the force and effect that these proceedings had upon these negroes. It would be vain and idle to indulge the hope that the effect was removed from their minds before the confessions were repeated to the state's witness."⁹

The facts in the case of *Reason v. State*¹⁰ are very similar to the facts in the instant case. In that case Reason, charged with murder, made a confession at the local jail as the result of threats that unless he did so he would be hanged as soon as he reached Holly Springs. This confession was not admitted, but the Court permitted the State, over appellant's objection, to introduce in evidence a second confession made as soon as the prisoner reached Holly Springs. The conviction was reversed because of

⁸ 2 East Pleas of the Crown, 658 (1785).

⁹ *Fisher v. State*, 145 Miss. 116; 132, 110 So. 361 (1926).

¹⁰ *Reason v. State*, 94 Miss. 290 (1908).

the introduction into evidence of the second confession. The opinion stated in part:

" * * * It is too plain for argument that this reiterated confession was induced by the same cause that underlay the first confession, since the danger of immediate death at Holly Springs could, in the opinion of the prisoner be averted only by adhering to his story * * *"¹¹

The Criminal Court of Appeals in its opinion in the instant case had no doubt that the circumstances surrounding the first confession made it clearly inadmissible. The opinion stated: "If we were dealing with the first confession in the instant case, as heretofore stated, we would unhesitatingly apply the rule as announced in the *Chambers* case and immediately reverse this case * * *" (R. 301). The opinion also stated: "We again emphasize that if the State in the instant case had introduced in evidence confession number one, and relied upon the same following the opinion in the *Chambers* case, we would unhesitatingly reverse this case" (R. 323).

The Criminal Court of Appeals of Oklahoma, however, ruled that the second confession *made on the same day as the first confession*, was admissible. Such an interpretation of the rule of due process of law will permit law enforcement officials to circumvent the rulings of this Court on the admissibility of confessions by following the procedure in the instant case of extorting a confession by force, violence, threats and long periods of questioning and then transferring the prisoner to another place and securing a second confession on the same day. Such procedure if upheld will nullify the long line of decisions of this Court.

This Court in the case of *Canty v. Alabama* (*supra*)

¹¹ 94 Miss. 290, 292.

reversed the decision of the Supreme Court of Alabama in a case where effort was made to substantiate a subsequent confession made under changed circumstances without relying upon the first confession which was obviously extorted by force and violence.

Petitioner requested the trial court to instruct the jury that: "You are instructed that if you find that at the time the confession was obtained at McAlester, that the defendant was still suffering from the treatment that he had received in the County Attorney's office or elsewhere by the officers that had him in custody or was induced to sign the confession by reason of fear as a result of the conduct of the officers that had him in custody and that by reason thereof said confession was not a free and voluntary confession, you are not to consider the confession, or any of the evidence therein contained." This instruction was refused (R. 264-265). The refusal of the trial court to give this instruction was a denial to the petitioner of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. The dissenting opinion of Judge Doyle of the Criminal Court of Appeals of Oklahoma pointed out that this instruction should have been given, stating: "The well established rule is that, if a confession has once been obtained through illegal influence, it must be clearly shown that such influence has been removed before a subsequent confession can be received in evidence" (R. 353).

II.

The conviction of petitioner by means of evidence obtained in disregard of the laws of the State of Oklahoma and refusal of the courts to supply any corrective process was a denial of equal protection of its laws and a denial of due process guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The active participation of the State of Oklahoma in denying to petitioner due process of law is apparent from the record:

(1) No warrant for petitioner's arrest appears any place in the record.

(2) Immediately after the crime was committed several prisoners from a nearby prison camp were arrested and charged with the crime so that the Warden of the State Penitentiary was sent to Hugo to make an investigation which resulted in a change of personnel at the prison camp.

(3) During the same period Vernon Cheatwood, investigator for the Governor of Oklahoma, was sent to Hugo and made an investigation during which time the prisoners from the State prison camp were released and W. D. Lyons was arrested. Cheatwood was one of the group questioning and beating Lyons prior to the time of the confession. Cheatwood was in the group of officers who brought Lyons from the State Penitentiary to the court house for his appearance before the magistrate and Cheatwood was present and testified at the trial itself.

(4) The long period of questioning, the beating of petitioner and the placing of the bones of the dead bodies in petitioner's lap all took place in the county prosecutor's office in the court house at Hugo.

(5) Both the county prosecutor and assistant county prosecutor were present during the time that the above acts took place. According to the county prosecutor's own admissions Lyons was struck several times in his presence in the court house immediately prior to the confession, and the county prosecutor had to stop the beating.

(6) Petitioner was "arrested" by civilians on January 11, 1940. He was not officially charged with any crime until he was given a preliminary hearing before a magistrate on January 27, 1940, after the confessions had been obtained. He was not represented by counsel at the preliminary hearing and as a matter of fact, did not have advice of counsel until February 4, 1940.

(7) The information charging petitioner with the crime of murder was not filed until August 29, 1940.

It is thus clear that the officials of the State of Oklahoma "subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding".¹²

The State of Oklahoma has set forth its minimum standards of due process of law by a series of statutes. Some of the pertinent provisions of these statutes are:

Oklahoma Statutes, 1931.

Section 2760. "If the offense charged in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant or some other magistrate in the County."

Section 2765. "The defendant must, in all cases, be taken before the magistrate without unnecessary delay."

¹² *McNabb v. U. S.* 318 U. S. 332, (1943).

Section 2766. "If the defendant be taken before a magistrate other than the one who issued the warrant, the complaint on which the warrant was granted must be sent to that magistrate, or if it cannot be procured, a new complaint must be filed."

Section 2768. "The officer who executes the warrant must take the defendant before the nearest or most accessible magistrate of the county in which the offense is triable with the return endorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by himself."

Section 2793. "When the defendant is brought before a magistrate upon an arrest, either with or without a warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and also of his right to waive an examination before any further proceedings are had."

Section 2794. "He must also allow to the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose; and must, upon the request of the defendant, require a peace officer to take a message to such counsel in the county or city as the defendant may name. The officer must, without delay, perform that duty, and shall receive fees therefor as upon a service of a subpoena
• • •"

Section 2795. "The magistrate must without a jury, immediately after the appearance of counsel, or if none appear and the defendant requires the aid of counsel, after waiting a reasonable time therefor, proceed to examine the case
• • •"

Section 2796. "The examination must be completed at one session unless the magistrate for good cause adjourn it."

Section 2799. "At the examination the magistrate must, in the first place, read to the defendant the complaint on file before him * * *"

Section 2800. "Preliminary examination * * * First: The witnesses must be examined in the presence of the defendant, and may be cross-examined by him * * *"

Section 2801: "When the examination of the witnesses on the part of the state is closed, any witnesses the defendant may produce must be sworn and examined."

Judge Doyle in his dissenting opinion in the Criminal Court of Appeals of Oklahoma, after reviewing the statutes and decisions of Oklahoma, was of the opinion that the judgment should be reversed because:

"A defendant in a criminal prosecution is entitled to a legal trial, conducted in accordance with the rules of law; and the question of his guilt or innocence should be determined upon legal evidence.

"Upon a careful review of the record, the authorities cited in the petition for rehearing, and under all of the decisions of this Court, so far as I can recall, I do not believe that the plaintiff in error has been tried and convicted in accordance with law, and did not have that fair and impartial trial which the law guarantees to one charged with crime." (R. 354)

The two most recent decisions in the Supreme Court bearing on this point are *McNabb v. United States*, 318 U. S. 332, and *Anderson v. United States*, 318 U. S. 350. In the *McNabb* case the Supreme Court set aside the conviction of second degree murder because the defendant had been arrested and held for interrogation without arraignment before a committing magistrate within the time required by law. In the *Anderson* case the defendant was convicted of conspiring to damage property of the T. V. A., and the Supreme Court set aside the conviction for the same reason as in the *McNabb* case. The trial court in each instance

went into the question only of whether or not the confession was voluntary and did not go into the question of delay before arraignment.

The Supreme Court reversed the judgments, holding that the voluntariness of a confession is not the sole determinant of its admissibility, for a confession may not be received in evidence if it is made by a person under arrest when the arresting officers have not complied with a statutory duty with respect to arraignment before a commissioner or other committing magistrate. If a confession is procured during a period of illegal detention, it is inadmissible.

A comparison of the Oklahoma statutes and the provisions of Section 595 of Title 18 of the United States Code shows no difference in the substantive rule of procedure. The Federal law requires the marshal or other officer to take the arrested person before the nearest United States Commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial. The statute makes no express reference to a temporal element, but the provision has been construed to require arraignment without unnecessary delay.

Section 300 (a) of Title 5 of the United States Code provides that in case the arrest is by an officer of the FBI, and the arrest is without a warrant, the officer shall take the person arrested "immediately" before a committing officer.

In the *McNabb* case the Supreme Court said that to permit the confessions to be the basis of a conviction, when the confessions have been obtained in willful disobedience of the law, or through willful disregard of the procedure required by Act of Congress, "would stultify the policy which Congress has enacted into law" (p. 345).

While the *McNabb* and *Anderson* decisions were in cases in which federal statutes were applicable and the *Lyons* case involves the application of state statutes, the principle

in the *McNabb* and *Anderson* cases is nonetheless applicable in the instant case, for, as was pointed out in the *McNabb* case, review by the Supreme Court of the United States "of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction".

In the instant case the officials of the State of Oklahoma made no effort to comply with the elementary principles of due process of law as outlined by the statutes of Oklahoma. The trial court admitted the evidence obtained in violation of these principles and the Criminal Court of Appeals of Oklahoma sustained this action of the trial judge.

A motion for rehearing was denied by a split vote. Although the judge denying the petition did not file an opinion, Mr. Justice Doyle filed a dissenting opinion based solely upon the question of the denial of due process of law as interpreted by the statutes of Oklahoma and was of the opinion that the case should be reversed on the basis of the *McNabb* case.

Conclusion.

The active participation of the State of Oklahoma, acting through its officials, in denying to the petitioner due process of law and the flagrant disregard for the statutes of the State of Oklahoma as well as the decisions of this Court interpreting the Fourteenth Amendment to the United States Constitution, requires a reversal of the judgment in this case. The refusal of the trial court and the Criminal Court of Appeals of the State of Oklahoma to enforce the laws of the State of Oklahoma as to due process denied to petitioner the equal protection of the laws as guaranteed

by the Fourteenth Amendment of the United States Constitution.

WHEREFORE, it is respectfully submitted that the judgment of the Criminal Court of Appeals of the State of Oklahoma in the above case be reversed.

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1943

No. 433

W. D. LYONS,
Petitioner,

vs.

THE STATE OF OKLAHOMA,
Respondent.

**On Writ of Certiorari to the Supreme Court of the
State of Oklahoma**

BRIEF ON BEHALF ON RESPONDENT

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May, 1944.

INDEX

	PAGE
Statement -----	1
The Evidence -----	4
Argument -----	13
I -----	13
Authority:	
Berry v. State, 4 Okla. Cr. 202, 111 Pac. 676 -----	14
Guthrey v. State, 24 Okla. Cr. 183, 216 Pac. 948 -----	14
O'Neil v. State, 38 Okla. Cr. 391, 262 Pac. 218 -----	14
State v. Ellis, 294 Mo. 269 -----	15
Whip v. State, 143 Miss. 757, 109 So. 697 -----	15
II -----	19
Authority:	
Neff v. State, 39 Okla. Cr. 133, 264 Pac. 649 -----	21
Conclusion -----	24

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S T A T E M E N T

As stated to the Court at the time this case came up for argument on April 26, 1944, petitioner's brief had been filed on April 7, 1944, but there had been no effort to comply with the rule of this Court by service of a copy of such brief upon the attorneys for the state, and we knew ab-

solutely nothing of the filing of same until the writer learned thereof at the clerk's office after arrival in Washington on April 25 and shortly before the matter was due to be reached for argument. Incidentally we notice that in this brief counsel were able to cite the pages of the printed record; whereas, we received no copy of such record until April 10th. For reasons partly stated to the Court, we were unable properly to prepare any brief until we had received the brief of petitioner. This fact is further verified by comparison of petitioner's brief with the stipulation which appears in the record beginning on page 355, and which had been entered into at the request of the clerk and counsel for petitioner in order to abbreviate the record. By said stipulation it is expressly agreed (R. 356):

"that the only issue to be presented by petitioner for consideration by the court shall be that of the admissibility in evidence of the confessions of petitioner introduced by the State of Oklahoma and admitted by the trial court, and whether such admission was a denial to petitioner of equal protection and a denial of due process within the meaning of the Fourteenth Amendment to the Constitution of the United States."

Yet under the discussion of alleged error II, beginning on page 24 of the brief, counsel make contentions beyond the terms of the stipulation.

Beginning with the last paragraph on page 11 of petitioner's brief, counsel make some statements with reference to the "only evidence produced by the State" with the exception of the confession. A rather interesting

answer is found in the brief of the American Civil Liberties Union, which brief, of course, was filed in the interest of the petitioner. On page 10 of said brief counsel state:

"The crime was committed with a shotgun not belonging to defendant, but to one Sammie Green."

It is quite evident that counsel for the American Civil Liberties Union were fully convinced that the gun introduced in evidence was the one with which the murder was perpetrated. In such case there could be no question as to defendant's guilt for it is shown by the testimony of the defendant, as well as the State's witnesses, that at the time the murders were committed the defendant was in possession of that gun. That fact is further set forth in the stipulation (R. 357) in the following language:

"The witness identified these shells as having been fired in the shotgun which the evidence showed to have been borrowed by the defendant from Sammie Green and to have been in the possession of defendant the night Elmer Rogers and his wife were killed."

On page 12 of petitioner's brief counsel state that:

"On the day following the murders Lyons went hunting about a half mile from where the Rogers home had been (R. 205-207)—Lyons shot twice at a rabbit and missed. He left the empty shells on the ground (R. 206)."

On such pages of the record the defendant was testifying with reference to alleged hunting on Sunday, the day of the murders. Later on cross-examination (R. 245) defendant stated that on Monday morning he went hunting in Mr. Hooks' pasture south of town. This was an entirely different direction.

THE EVIDENCE

Beginning on page 2 in the brief of petitioner appears a purported "Statement of Facts." Only a small portion of such statement is entitled to be so designated. Most of it might more properly be designated "Lyons' testimony." It blandly ignores the mass of testimony contradicting him. It even exemplifies some of the discrepancies in his testimony. For instance, near the top of page 10 they tell us it was about 10:00 or 10:30 p. m. that Lyons was taken to the warden's office at the penitentiary. Later in the brief, in endeavoring to shorten the time between the confession at Hugo and the one at McAlester (p. 14), they tell us that the confession at Hugo was made about 4:30 in the morning and the one at McAlester "some time before 11:00 o'clock on the night of the same day." Yet they ask us to believe Lyons' statement that he was questioned for about two hours by Warden Dunn and Deputy Sheriff Van Raulston, and beaten for about an hour and a half or two hours by Van Raulston.

We shall not burden this brief with any detailed discussion of the testimony as to the taking of the confession at Hugo. Beyond the fact that Lyons was questioned for some hours and that a pan of the dead people's bones was placed upon his knees and he was required to handle them, as the officers frankly admitted, the details are a matter of dispute. We have never found any reason whatever for believing the defendant's story, particularly in

view of the flagrant and very evident perjury with reference to what happened at McAlester. Under the circumstances, however, the State did not at any time offer such confession in evidence and made no reference to it until after the defendant had testified before the jury that he was forced into such confession and that in such confession he said "what they made me say and told me to say" (R. 227). He had sworn similarly with reference to the confession at McAlester and had adopted the language suggested to him by his counsel that he had answered the questions "in the way they wanted them answered" (R. 221). After this testimony with reference to the Hugo confession we sought to question him as to what he had said, for the purpose of showing that the two confessions were not the same; that he was not telling a story dictated to him by others, and that, as he later told Warden Dunn at McAlester (line 10, R. 91), he had not told the truth at Hugo. The court, however, would not permit us to cross-examine the defendant as to such statements and we made no other effort to use such confession.

With reference to the confession made at McAlester, the testimony of the defendant is summarized in the "Statement of Facts" in petitioner's brief, beginning on page 9. His claim of mistreatment was positively contradicted by the testimony of Deputy Sheriff Van Raulston, Roy Marshall, a barber, and Warden Jess Dunn. Van Raulston and Marshall took the defendant from Antlers to McAlester,

and were present at all times until the confession of defendant had been taken, transcribed and signed.

Van Raulston, stated by counsel to have been one of those present when the confession at Hugo was taken, testified that he, together with Roy Marshall, took the defendant from Antlers to McAlester and to the warden's office where the confession was made; that the defendant was not beaten or threatened by anyone (R. 82, 83, 113); that the warden told the defendant the statement he was about to make would be used against him in court; that there was no conversation about the electric chair (R. 83). The witness further testified that he was not present when the confession at Hugo was taken; that he was present in the county attorney's office for just a few minutes about nine or ten o'clock that night; that there were two or three people there questioning defendant, but that witness had no knowledge of the confession (R. 113, 114, 116). The witness was injured in a car wreck on the night of the murders and did not take much part in the investigation (R. 115, 118).

Roy Marshall testified that he was a barber; that he had no interest in the outcome of the case, but went along at Raulston's request to drive the car as Raulston had been in a wreck. Witness was present all the time until after the confession had been signed. Defendant was not beaten, struck or threatened in any manner. "Mr. Dunn asked him if he knew his rights and he said he did. He had been there before. And that the confession could

be used, and he said yes. He asked him if he wanted to make a statement and he told Mr. Dunn he did" (R. 85). The witness saw no swollen eye or other marks of violence about defendant (R. 86). On the trip to McAlester defendant was riding in the back of the car and "I think he went to sleep a part of the time" (R. 120). It was dark or about dark when they left Antlers (R. 121). It was around thirty minutes after they got to McAlester that the confession was made. Mr. Dunn talked with him a few minutes (R. 122). Mr. Dunn "asked him when he done the shooting, where he was standing and how he shot the man through a window * * *." He answered, told where the man was standing, that he had been in the corner, when he came out by the window, he showed Mr. Dunn, turned his side to the window and showed Mr. Dunn where he shot the man" (R. 124).

The most clear and convincing evidence with relation to the McAlester confession is found in the confession itself and in the testimony of Warden Jess Dunn with reference thereto. This confession is set forth in the record on pages 92 to 102, and the testimony of Mr. Dunn is found on pages 23 to 25, 90 to 92 and 102 to 112. The confession is also quoted in full in the opinion of the Criminal Court of Appeals on pages 302 to 310. Mr. Dunn's testimony before the jury is also quoted in full in the opinion of the Court on pages 311 to 323. The Court did not quote the testimony of the warden given out of the presence of

the jury. The major portion of such testimony reads as follows (R. 23, 24, 25):

Q. "When did you see him with reference to that murder?

A. He was brought into the penitentiary and into my office, I don't recall the date, or the time, but he was brought there by the then deputy sheriff.

Q. Do you know who brought him?

A. He was a deputy sheriff and there was a barber that came. I don't remember either one.

Q. Do you remember that it was Van Raulston and Roy Marshall?

A. That is who it was, Raulston and Marshall.

Q. Did you talk to the defendant?

A. Yes, sir.

Q. At that time?

A. Yes.

Q. Where did that conversation take place?

A. In the penitentiary, in my office.

Q. Who was present?

A. Raulston, Van, the deputy sheriff, and the barber from here, and the chaplain, Seals, chaplain of the penitentiary.

Q. Mark this State's Exhibit Nine. Did you have a stenographer present?

A. Yes.

Q. To take down the conversation?

A. Yes.

Q. Did you question the defendant?

A. Yes.

Q. Did he answer the questions?

A. Yes.

Q. Did the stenographer take it in your presence?
[fol. 104.]

A. Yes.

Q. At your request?

A. Yes.

Q. Mr. Dunn, I hand you State's Exhibit Nine. Will you identify that?

A. That is the statement that was taken in the office, in my office in the Oklahoma State penitentiary. This is his signature that he signed, and this is his thumb print, finger and thumb print on this document.

Q. Did he sign that at your request and in your presence?

A. Yes.

Q. Did he place his thumb print on it in your presence?

A. He did.

Q. Was any force used on him?

A. Not one bit on earth.

Q. Was he made any promise?

A. He was not made any promise?

Q. Or threats?

A. No promise or threat. When they came to the penitentiary I told them to bring him to my office. I had handled this boy before.

Q. Did you have him brought to your office?

A. They came to my office after they got to the penitentiary. I asked the boy did he want to

make any kind of statement, and he said, 'yes, I'll tell you all about it.' [fols. 106-110]. I went to questioning him and told the boy, I asked him was he afraid, and asked him was he afraid to talk in there. He said he was not, and he answered every question that I asked him, and I think the boy told the truth, just as it was."

We do not attempt to set out here the testimony as quoted in the opinion of the court except a single paragraph which reads as follows (R. 91):

"He and Van Raulston and a boy named Marshall came into my office along, I guess, about nine thirty in the evening, came in and sat down, and talked to the boy. I knew him before he came up there. And I asked him had he told the truth about this case, and he said he hadn't. I asked did he want to tell the truth about this case, and he said he did. I asked him did he want to make a statement. He said he did. Then I told him his rights in the case. I told him what statement he made would be used against him, and for him not to make a statement unless he voluntarily wanted to and it would be his own free will and voluntary if he made a statement. Then I asked him did he want to make a statement, and he said he did. And I asked him a few questions, then I called in my secretary and told him that I was going to take down what he said and asked him did he want to sign it. He said he did. After the statement was taken, he got up and signed those pages and put his thumb print on each page. All voluntary things, and the office was as quiet as this is now. He was as calm and cool as he is now. His treatment in my office was the treatment he has now in this court room."

A few days after this first confession was made at McAlester defendant made another statement and admission of the murder to Cap Duncan, who had been former sheriff of Choctaw County and was such sheriff at the time

of the trial, but was at the time of the crime a guard in the state penitentiary, and to Bert Crawford, who formerly lived at Fort Towson and was acquainted with defendant as well as the murdered family. Neither of these men had any previous connection with the investigation. We quote the entire record with reference to this confession. It is found on pages 124 to 126 of the record and is as follows:

Q. "State your name.

A. Cap Duncan.

Q. [fol. 238]. What position do you hold in Choctaw County?

A. Sheriff.

Q. What position did you hold last January, 1940?

A. I was sergeant at the Oklahoma State penitentiary.

Q. Do you remember the occasion when the defendant was brought to the penitentiary?

A. Yes.

Q. Did you talk to him any time after he had been brought up there?

A. I did.

Q. How long had he been there when you talked to this defendant?

A. I wouldn't be positive. I would say two or three or four days.

Q. Where was he when you talked to him?

A. He was 'on high,' what we call it, about the fourth floor.

Q. Was he in a cell?

A. Yes.

- Q. Who was present when you talked to him?
- A. Another guard, Bert Crawford.
- Q. Was anyone else present?
- A. No, sir.
- Q. When you had this conversation with him did you use any threats toward him?
- A. I did not.
- Q. Tell the jury how you happened to talk to him?
- A. Mr. Crawford had once lived at Fort Towson. He knew W. D. Lyons and the Rogers family. We went to talk to him. Mr. Crawford and I went to talk to Lyons.
- Q. Was anyone else in the cell with W. D. Lyons then?
- A. No, sir.
- Q. Did you talk to him about this murder [fols. 239-245],
- A. Yes, sir.
- Q. What was said?
- A. He said he and Van Bizzell killed the Rogers family.
- Q. How did he say he killed them?
- A. Shot them."

Cross-examination by Mr. Belden

- Q. "Now, Mr. Duncan, you were a former sheriff in this county?
- A. Yes, sir.
- Q. And have been an officer for a long time?
- A. I was an officer twelve years.
- Q. And have been living here, and have been a former sheriff, how many terms? Two?

A. Yes, sir.

Q. And knew about the situation down there, and was interested in it, you knew that the confession was obtained?

A. Yes, I had heard about it. I had not seen them and didn't hear them made.

Q. And you did go back to talk to him again about it?

A. Yes, sir.

Witness excused.

By Mr. Marshall: If Your Honor please, for the sake of the record, may we have the record show that pursuant to his duty, Mr. Duncan has been in the court room the whole time and will be and that the rule does not apply. He has been with Lyons the whole time, but I think the record should show that he has been.

By the Court: I don't know whether he has been.

By Mr. Duncan: Yes, sir, I have been here all the time.

By the Court: Yes, the record may show that Mr. Duncan is the sheriff and has been in the room and was excused from the rule."

ARGUMENT

I.

It is alleged that the admission of the confessions made at McAlester was a denial of due process within the meaning of the Fourteenth Amendment to the Constitution of the United States.

In view of the petitioner's palpably false statements as to what happened at McAlester we have found no rea-

son for relying upon his story as to the proceedings at Hugo. However, for the reasons later expressed by the trial court and the Criminal Court of Appeals, we treated said confession as incompetent. We, therefore, approach the question as to the admissibility of the second confession with the premise that the Hugo confession was involuntary. It is a well established rule in Oklahoma that a confession is presumed to be voluntary and admissible in evidence, and where its admissibility is challenged by the defendant, the burden is on him to show that it was procured by such means or under such circumstances as to render it inadmissible, unless the evidence on the part of the state tends to show that fact.*

Furthermore, a confession, though obtained without warning that it might be used against him, and by persistent questioning on the part of the officers, but without deception or hope of reward, or any threat or inducement other than a remark that it would be better for him to tell the truth, is admissible as a voluntary confession.** Yet having conceded the involuntary character of the Hugo confession we have been perfectly willing to assume the consequent burden with reference to the confession made at McAlester. We shall not, therefore, engage in a discussion of the various cases cited in petitioner's brief, though counsel have made some erroneous

* *Berry v. State*, 4 Okla. Cr. 202, 111 Pac. 676; *Cuthrey v. State*, 24 Okla. Cr. 183, 216 Pac. 948.

** *O'Neil v. State*, 38 Okla. Cr. 391, 262 Pac. 218.

statements with reference to the decisions as well as the facts. For instance, in referring on page 19 to the case of *State v. Ellis*, 294 Mo. 269, also reported in 242 S. W. 952, they state that the prosecution made no effort to introduce the first confession. In fact both confessions were introduced. Nor are we concerned as to the Mississippi cases, though that court has established a rule placing a much greater burden upon the state with reference to confessions than our own court has ever expressed. In the case of *Whip v. State*, 143 Miss. 757, 109 So. 697, the court held that:

"In order to make competent a confession of guilt by a defendant charged with crime, the evidence of such confession must be so strong as to exclude every reasonable doubt that it was procured from the defendant under a threat of punishment, or a promise of reward. It must exclude every reasonable doubt that the confession was not freely and voluntarily made."

But we believe that, as held by our own court, we have fully met the test with reference to the McAlester confessions and that there can be no doubt that these confessions were not only true, but that they were entirely free and voluntary.

When the defendant was brought to the penitentiary at McAlester he was returning to a place and to surroundings and a life with which he was thoroughly familiar. He had already served two terms in this prison. He had last been released on October 4, 1939 (R. 227), which was scarcely three months before. He knew Warden Dunn.

He knew the rules enforced in the penitentiary. He well knew that he would not be touched. Yet counsel ask the Court to find that Warden Dunn would sit idly by while an outsider beat a prisoner for an hour and a half or two hours until he had beaten him into a confession. They ask this Court to accept the wholly uncorroborated story of the defendant in the face of the positive testimony of Warden Dunn, Van Raulston and Marshall and the findings of the jury and the state courts. The petitioner himself made an entirely new and distinct transaction out of the McAlester confession, claiming that he denied guilt and that he was questioned for two hours and beaten for an hour and a half or two hours until finally forced into a confession. Yet counsel state in their brief, as already mentioned, that the confession was made "some time before 11:00 o'clock," though they tell us he did not reach the prison until about 10:00 or 10:30. They were trying to shorten the time between the two confessions, as they state in the same connection that the confession at Hugo was made about 4:30 in the morning. The testimony of the officers placed it between 12:00 and 2:00 o'clock.

On page 20 of their brief, counsel refer to Van Raulston, "who was present when the first confession was obtained," which was plainly untrue. On the same page they state "it is peculiarly significant that the only completely disinterested witness to this confession, the chaplain at the penitentiary, was at no time called to the witness stand by the prosecution." In other words, they would

say that Roy Marshall was interested and not to be believed, even though he was merely a private citizen who had no connection whatever with the case except to drive Van Raulston's car, at Raulston's request, because of Raulston's injury, and no accusation of any kind was made against him by the petitioner. Counsel do not mention the stenographer who took down the confession and transcribed it, but they would probably say he was not disinterested since he was an employee of the penitentiary. Had we introduced the chaplain they would have said he too was not disinterested because he too was an employee. Moreover, the defendant himself stated that he was not mistreated in the presence of the stenographer or chaplain. In view of that fact, we would see no reason for bringing the stenographer and chaplain down to Hugo. Aside from that fact, the thought would never have occurred to us that any jury or court could ever possibly consider accepting the story of the defendant in the face of the testimony of such a man as Warden Jess Dunn, even without the added testimony of Van Raulston and Marshall.

According to the testimony of the defendant it was about sundown or dark or six o'clock when he, with Raulston and Marshall, left Antlers for McAlester. While Mr. Dunn, Raulston and Marshall were rather uncertain as to the time when they arrived at McAlester, the stenographer showed that the confession was taken at eight-fifteen. This was central standard time and in January.

The official state highway map shows the distance by hard-surface road from Antlers to McAlester as 77 miles. Mr. Dunn testified that he talked with the defendant about twenty minutes before calling the stenographer. The warden already knew the general facts concerning the murders, but nothing of the details as to defendant's connection therewith or the story he had told at Hugo. Due to his knowledge of the background of the case and after this brief talk with the defendant, the warden called the stenographer and proceeded to take the confession by question and answer. It will be noted that many times the warden asked questions based on an erroneous impression as to the facts, and he was promptly corrected by the defendant. The time of departure from Antlers and the eight-fifteen hour at which the stenographer began to take the confession fit in perfectly with the distance from Antlers to McAlester and the preliminary talk between Mr. Dunn and the defendant, but they make impossible the defendant's story as to the three and a half to four hours of questioning and beating to which he claims to have been subjected.

On page 18 of their brief, counsel devote a paragraph to defendant's confession to Sheriff Duncan and Bert Crawford. They inform us "this alleged admission was made while the petitioner was still under the influence of prior intimidation, coercion and beating, which intimidation continued up to the time of the arraignment." Nobody has ever said so except counsel for petitioner. They made

no objection to Duncan's testimony, and were careful to let him alone on cross-examination. They also avoided asking the defendant any question about the confession made to Duncan. They did not attack Duncan's testimony in any way or make any request of the trial court for the exclusion of such testimony or even refer to it in their requested instructions, but they asked the Criminal Court of Appeals and now ask this Court to accept their statement, wholly unsupported, that such confession to Sheriff Duncan was involuntary and inadmissible. The statement to Duncan was made two to four days after Lyons had been placed in the penitentiary, and, therefore, must have been made about the time he was taken back to Hugo for the preliminary hearing, at which time, it will be noted, he did not plead guilty though back in the hands of officers who, it was claimed, had beaten and intimidated him. For counsel to take the position that the trial court should have excluded, on the court's own motion and without objection by counsel, the testimony of Duncan appears to us nothing less than absurd.

In the paragraph following the reference to the admission to Duncan, counsel state that there were at least twelve officers and individuals in the room during the time defendant was questioned at Hugo, when the first confession was taken, and that the prosecution only called four of these persons. The record shows that of the twelve listed by counsel on pages 5 and 6 of their brief, seven were called as witnesses by the state during the trial,

though not all of them were used at the hearing out of the presence of the jury with reference to the admission of the confession.

In the oral argument before this Court counsel for petitioner stated that Cheatwood repeatedly visited Lyons in the penitentiary during the period prior to the preliminary. There was no justification for such statement and it was contrary to all the testimony. Not even the defendant made any such claim. Cheatwood never saw him from the time he left Hugo until the day of the preliminary, and defendant's claim of mistreatment at the hands of Cheatwood on that day was positively contradicted, and seems further refuted by the fact that though he claims to have been in Cheatwood's custody on the trip to Hugo he did not enter a plea of guilty.

II.

It is contended that the State of Oklahoma denied to the petitioner equal protection and due process by failure to follow the procedure outlined in the various statutes of the state, cited by counsel, with reference to arrests, arraignment before a magistrate, allowance of counsel, preliminary hearing, etc.

As we have heretofore pointed out, counsel have departed from the terms of the stipulation. They are further attempting to raise issues not presented to the trial court and not presented to the Criminal Court of Appeals until the filing of the petition for rehearing. These issues

relate to matters occurring prior to the filing of the information in the district court, and even if there had been any merit to them they would have been waived by failure to properly present them to the trial court, and further waived by failure to preserve and present them to the Criminal Court of Appeals. Even the right to a preliminary examination, as well as irregularities therein, is waived unless properly raised before a defendant pleads to the merits of the information in the district court. *Neff v. State*, 39 Okla. Cr. 133, 264 Pac. 649.

Counsel make the statement that "no warrant for petitioner's arrest appears any place in the record." The same thing could be said with reference to many thousands of other records in cases which have been brought up on appeal to the Criminal Court of Appeals. These records only purport to show the proceedings before the trial court, not those before the magistrate. The latter are not incorporated in the record unless the defendant has properly raised the issue as to such preliminary proceedings and they have been made a part of the record. In felony prosecutions, unless they have been instituted by grand jury indictment, the warrant for the arrest is not issued in the district court, and the silence of the record as to the issuance of a warrant is of no significance.

Under subdivision (6) on page 25 of petitioner's brief, it is stated that "petitioner was 'arrested' by civilians on January 11, 1940." Aside from the fact that under certain conditions an arrest may be legally made

by civilians, the statement is not justified by the record. From the record it appears that Reasor Cain, who was a special officer for the Frisco railroad and who had been requested by the sheriff to work in the case (R. 129), went with "other officers" to the place where Lyons was living. "There was two or three cars of officers that went down there" (R. 127). Oscar Bearden was among them. Lyons wasn't there. "His wife said he run off." All the officers left except Cain. Oscar Bearden came back, and upon Lyons' return Bearden and Cain arrested him. On cross-examination of Cain counsel, who now assert that the arrest was made by civilians, twice referred to Bearden as "the officer with you" (R. 129).

Counsel next state that Lyons "was not officially charged with any crime until he was given a preliminary hearing before a magistrate on January 27, 1940." Aside from the fact that the record is silent upon the subject, no such issue being raised by the defendant, the statement is plainly without justification. There can be no reasonable conclusion other than that there had been a complaint filed and a setting of the preliminary hearing for the 27th of January. Certainly nothing to the contrary appears in the record.

Counsel quote various statutes of the State of Oklahoma with reference to proceedings before magistrates, as if such statutes had been completely ignored in this case. If that had been true counsel had the opportunity to have properly raised the issue and to have presented

any evidence before the trial court. They did not do so. Not only does the presumption of compliance prevail, but the record indicates that there had been every effort to protect the rights of the defendant in connection with the preliminary proceedings. It will be noted that the Criminal Court of Appeals referred to the fact that counsel evidently had in their possession a transcript of the proceedings at the preliminary hearing. This fact appears in connection with the proceedings at the trial when the county attorney sought to use the testimony given at the preliminary hearing by a physician who at the time of the trial in the district court was sick and unable to be present. These proceedings appear on pages 18 to 23. It appears from page 22 that counsel for the defendant Lyons produced and had identified as a defense exhibit a transcript of the preliminary hearing. It further affirmatively appears (R. 21) that defendant was advised of his right to counsel; that the magistrate appointed an attorney for the co-defendant and endeavored to secure two different attorneys to act for defendant Lyons. While the Constitution guarantees the right to counsel it does not guarantee counsel. In other words, it does not guarantee counsel to be furnished by the state. And in the entire record there is no evidence to warrant any assertion that the defendant was ever denied his right to counsel. On the contrary, the county judge, sitting as an examining magistrate, went beyond the limits of his duty or authority. We have no statute authorizing the appointment of

counsel for defendants in preliminary proceedings, yet the county judge endeavored to make such appointment and fully advised Lyons of his right to have an attorney. Moreover, this defendant was no novice; he had already been twice convicted and served two terms in the penitentiary. The record does not justify any assertion or assumption of imposition or denial of his constitutional rights.

Counsel make reference to and quote from a "dissenting opinion" filed in connection with this case in the lower court. There exists a situation with which this Court is not familiar and about which we do not care to comment. We merely call attention to the fact that the opinion of the Criminal Court of Appeals, which we regard as a very thorough and exhaustive one and which carefully covered all of the issues presented to the court, was unanimous and concurred in by all the judges. An extension of time was granted to counsel in which to file their petition for rehearing, and when such petition was later overruled on July 21, 1943, there was no dissent. It was not until three weeks later, August 18, 1943, that this "dissenting opinion" was filed. It is based chiefly upon an adoption and acceptance of the allegations of the petition for rehearing.

CONCLUSION

In conclusion, may we urge that the opinion of the Criminal Court of Appeals in this case presents a review of the facts, the issues and the applicable decisions and

statutes in a manner and to an extent evidencing exhaustive study and an endeavor to fully protect every right of the defendant and secure to him and all others charged with crime a fair trial and equal and unbiased justice. Certainly such opinion is entitled to great weight in the consideration of this case by this Court. It has been the effort of those representing the state in the trial court and in all the subsequent proceedings to see to it that the defendant had a fair trial. An examination of the record will disclose that not once from the beginning to the end of the trial or in the subsequent proceedings did counsel for the state ever make the slightest reference to the race or color of the defendant. Of the guilt of the defendant we do not believe there can be the slightest doubt. We believe that he has been convicted upon legal evidence and after a fair trial, and that he was most fortunate in escaping the death penalty, a fact which we are quite certain resulted from the reaction of the jury to the mistreatment admittedly given the defendant there at Hugo.

Wherefore, it is respectfully submitted that the judgment of the trial court and the decision of the Criminal Court of Appeals of the State of Oklahoma should be affirmed.

Respectfully submitted,

RANDELL S. COBB,
Attorney General of Oklahoma,
SAM H. LATTIMORE,
Assistant Attorney General,
Counsel for Respondent.

May, 1944.

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CHARLES ELMORE GROPLEY
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943

No. 433

STATE OF OKLAHOMA,
Plaintiff-Respondent,
against

W. D. LYONS,
Defendant-Appellant.

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION,
AMICUS CURIAE**

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INDEX

	PAGE
PRELIMINARY STATEMENT	1
THE ISSUES INVOLVED	2
POINT I—The second confession was so close in point of time and circumstances to the first, that it should have been ruled out, for the same reasons which vitiated the first confession and made it inadmissible	4
POINT II—Without the confession improperly received in evidence, the State has woefully failed to make out a case	10
CONCLUSION	15

Case Cited

Canty v. Alabama, 309 U. S. 629.....	9
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Statute Cited

United States Constitution, 14th Amendment.....	3
-------------------------------------------------	---

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Preliminary Statement

The parties herein have granted permission to the American Civil Liberties Union to submit this brief as *amicus curiae*. The American Civil Liberties Union, after a comprehensive study of the record and a consideration of the applicable principles of law, submits that the conviction of the defendant-appellant is in violation of the civil rights of a person accused of crime.

The American Civil Liberties Union is a non-partisan, non-sectarian organization. It has a membership of thousands in all states of the union including Oklahoma. For more than twenty years it has pursued the object stated in its charter, namely, to maintain civil liberties throughout the United States and to take all legitimate action in furtherance thereof. Accordingly, the fundamental rights

of persons, no matter what their race, creed or color have been defended in the courts, and the American Civil Liberties Union has appeared as *amicus curiae* in many cases involving the issues of civil liberties.

The possibility of destruction of the rights of criminal defendants, so carefully protected by a wise judiciary, may well be accomplished by the use of techniques such as those employed in this case. It is the concern that our constitutional guarantees "may be frittered away by arguments so technical and unsubstantial," that has prompted its intervention in the public interest in this case.

The Issues Involved

Defendant-Appellant is a twenty-two year old negro. In December, 1939, in Choctaw County, Oklahoma, a revolting crime was committed. A man, his wife and small child were murdered. The two adults were shot; their bodies mutilated with an axe; and the shack in which they lived set on fire. The undertaker who called with an ambulance to remove the three bodies, had to pour water on them to cool them off sufficiently to enable them to be removed.

Defendant has been convicted on circumstantial evidence of doubtful persuasiveness, but mainly because of an alleged second confession which he made to the Warden of the Oklahoma State Penitentiary in McAlester.

Though a long parade of witnesses testified against defendant, there is no testimony actually connecting the defendant with the murder except this confession. No eye witness linked defendant to the tragedy. The gun was not the property of defendant, but of one Sammie Green. The axe was not the property of the defendant, but of Elmer Rogers, the murdered man. Though de-

fendant was at various times placed near the scene of the tragedy, that fact has no probative value because Fort Towson is a small community.

The trial judge rightly refused to admit the so-called first confession. He held, "The Court finds that the defendant may have been frightened into making the confession that was made here in the Court House by long hours of questioning and placing bones of the purported bodies of the deceased persons on his lap during the questioning" (R. 89). The second confession made on the same day only a few hours later was admitted in evidence by the trial court. Appropriate objection was taken by defendant's attorney "for the reason that it is a denial of the constitutional right of this defendant and of the 14th Amendment of the Constitution of the United States as to due process of law". (R. 92).

It is submitted that the second confession taken on the same day, was tainted with the same illegality as the first. Not only was it almost contemporaneous in time, but one or more of those present when the first confession was extorted from defendant, was present during the second alleged confession. Furthermore, defendant, who had been without sleep for days, was under the same fear of threats and violence when he made the second confession in the penitentiary, as he was when he made the first one, which the court ruled out.

POINT I

The second confession was so close in point of time and circumstance to the first, that it should have been ruled out, for the same reasons which vitiated the first confession and made it inadmissible.

This ignorant negro boy did not have the benefit of counsel when each confession is alleged to have been made. He testified that after his arrest he was beaten on Jefferson Street about a quarter of a mile from the court house (R. 29). His hands were tied behind him with his own belt; he was knocked down and kicked by the officer (R. 30); he was struck across the head with a piece of one inch board about three feet long (R. 30); he was told that he "was going to burn me, kill me by degrees if I didn't confess" (R. 30). His head was bumped against a tree; he was hit in the mouth with the jail house keys; he was beaten with fists; kicked in the stomach and ribs (R. 31); one of the many men present had on cowboy boots and he kicked the skin off defendant's shins (R. 32); his eye was blackened and closed; scalp "busted"; face swollen (R. 34).

Eleven days later he was beaten again (R. 34). A highway patrolman hit him with a blackjack (R. 35). He was kept in the County Attorney's office from 6:30 in the evening until 4:30 o'clock the next morning. At least six or seven officials were present. He was handcuffed to a chair, he was beaten all night, until about 4:30 in the morning (R. 39). They brought a pan full of bones that they said came from those bodies of Mr. and Mrs. Rogers (R. 40). They set them up on his lap. He was asked if he wanted to say his prayers (R. 41). It was as a result of this terrible physical ordeal and the fright induced in

the superstitious mind of this poor ignorant prisoner that the first alleged confession was extorted.

Then he was taken to the scene of the crime. While he was in the highway patrolman's car, he was told he would be taken to the scene of the crime and a big fire made with which they were going to burn him (R. 42). He was threatened with a pick hammer (R. 43). There the officers searched the ashes. Harvey Hawkins had an axe in his hand when the defendant turned around (R. 43). Defendant was accused of putting the axe there. He denied it and was again threatened with the black-jack (R. 44). Defendant states that he had been rabbit shooting that morning and that he used a number 4 shot, 12 gage shell. He was then taken to another place about a quarter or a half a mile southeast. He showed the officers where to find the shells that he was hunting with and they found two shells (R. 45). About 2 o'clock that afternoon he was brought a statement and told to sign it. This constituted the alleged first confession. Then his picture was taken with the officials in the jailhouse yard about 3:30 in the afternoon (R. 48). After that, he was taken to the State Penitentiary. Van Raulston an official present at the first alleged confession was also present when the second alleged confession was made. Defendant was told, "You either answer our questions or get treated like you was down at Hugo". This by Van Raulston, the same man, with the same blackjack which had extorted the first alleged confession. Defendant was "already hurting from that last night beating. I hadn't had any sleep since that Sunday night, it was Tuesday night then" (R. 50). It was then that the alleged second confession was made. He was asked if he was sleepy, and taken where the death cells are (R. 51) near the electric chair (R. 52). The warden told him that

he had sent 39 men to their death in the electric chair (R. 52), and that, "If I don't plead guilty then I would be the 40th one." He was told that he had better plead guilty on the stand or he wouldn't get back alive (p. 136).

The trial court had little difficulty in believing defendant's testimony and refused to admit the first confession. In fact so tainted with fraud and disgraceful behavior was this confession, that the county officials did not even have the temerity to offer it in evidence (R. 90). The County Attorney, who was present throughout the shocking performance, himself asked, "Isn't it true that Vernon Cheatwood had a strap of leather and was tapping you like that all because you refused to answer questions they put to you?" Defendant answered, "That blackjack he had was loaded," to which the County Attorney replied, "How do you know it was loaded (R. 55)

* * * Isn't it true that you refused to answer and they struck you on the knee with a piece of leather?" And again the County Attorney queried, "Isn't it true that after they got through hitting you as you say with a strap of leather, and you refused to answer my questions at all times, that I made them stop whipping you and told them to get out of the room and I asked you if you wouldn't talk to me alone, is that right" (R. 56).

Roy Harmon, the sheriff of the County was not too clear as to whether defendant was beaten at the time of the confession. He was asked, "Did you see any of the officers strike him?" His answer was, "I don't remember, if I did" (R. 61). He was asked, "Could it have been possible for some officer to strike him in your presence and you not see him?" His answer was "Could have".

"Q. In your presence? A. I could have not been looking."

When asked whether the officers had blackjacks, his answer was "Well, I don't know, it is kind of customary for them to carry them with them."

"Q. I mean in their hands? A. I don't remember."

"Q. Can you answer the question yes or no? A. I said if they did, I didn't see them. Because there was a crowd around there." (R. 61)

He admitted that someone could have taken Lyons out of that room and questioned him and if they did, the Sheriff didn't know it. He didn't remember whether there were any threats (R. 64). When asked whether he had helped the defendant, his answer was "I don't think so" (R. 64). He found great difficulty in recognizing his picture with the defendant. He said, "Looks a little like me but there are several fellows here that favor me" (R. 65). When asked whether it looked like the defendant, his answer was, "I can't tell these negroes apart" (R. 65, 66). He was able to point out defendant in the courtroom, but still insisted that the "picture didn't favor him anyway." When asked whether he mentioned to defendant the possibility of a mob doing anything, his answer was, "There was something said about, I believe I am not sure, about the National Guard being here, and I told him I was afraid there might be trouble" (R. 68).

The deputy sheriff, Floyd Brown, testified that Van Bizzell, co-defendant was slapped, and that Cheatwood did it with his open hand (R. 72). And then we have the most naive bit of testimony in the entire case. Floyd Brown, a deputy sheriff was asked if in order to get a confession out of this defendant, they put a pan of bones in his lap (R. 73). He admitted that defendant was told those were the bones of Mr. and Mrs. Rogers. When asked why the pan of bones was put in his lap, his an-

swer was, "I figure it was to get him to thinking about what he did." He admitted the purpose was to get a confession. He was asked whether most colored people are superstitious and afraid of the dead, whether the purpose of putting those bones in his lap was to frighten defendant. His answer, which the trial court undoubtedly took into consideration in ruling out the first confession is a clear indication of the thinking of the law enforcement officers of Choctaw County, Oklahoma. The deputy sheriff answered, "I wouldn't say that was the purpose, but it might help a good bit" (R. 73).

All this evidence has been recapitulated so that it hardly seems necessary to belabor the point that the second confession taken a few hours after the first on the same day was vitiated by the very circumstances which rendered the first confession inadmissible.

The trial court, however, admitted the second confession in the mistaken notion that it was several days, not hours, after the first (R. 231). The defendant had not slept for three days, he had had no rest certainly between the first and the second confession. He had been up all of the night, was then taken to the scene of the crime and finally to the State Penitentiary. Thus, there was a continuous, virtually unbroken incident from the horrible experiences which extorted the first confession, to the obtaining of the second confession. Since Van Raulston, one of the officials present at the first confession was also present and obtained the second confession, it is difficult to understand the trial court's technical differentiation between the first alleged confession and the second. He found that the defendant may have been frightened by long hours of questioning and by placing bones of the purported bodies of the deceased persons on his lap during the questioning, and refused to admit the

first alleged confession (R. 89). Indeed, no reasonable person could have come to any other conclusion. That the court saw a highly technical distinction between the first and the second confession ignores the practical consideration that the two confessions were obtained on the same day, within a few hours of each other, and that both are alike tainted with the intimidation and illegal methods used to obtain them. Defendant later in the afternoon of the 23rd of January, 1940, was suffering from the same ill effects which had produced the first confession early in the morning of the same day.

This Court, always zealous to protect the rights of the poor and downtrodden, had no difficulty in reversing a conviction obtained on a second confession in a similar case,—*Canty v. Alabama*; 309 U. S. 629. There the treatment was applied to the prisoner at a police station in Montgomery. He was then carried miles away to Kilby Prison, where he made a second confession purporting to be without direct application of force and in the presence of persons not present in Montgomery.

It is submitted that the courts should scrutinize second confessions with extraordinary care. Theoretical distinctions and gossamer technicalities should not cut down the great principle that an accused should be free from torture in order to render a confession admissible. This Court should not permit the constitutional guarantee to an accused to be weakened and diluted by any subterfuge.

Here the County Attorney did not have the courage to offer the first alleged confession in evidence. As a prosecutor, an officer of the court and representative of the law, his own hands were not clean because of his participation in the revolting inquisition leading to the first confession. It is all too clear that the defendant's mind and heart had been broken at the first shocking

episode. Is it possible that this was done in the hope that the second alleged confession could be procured more readily and with a greater simulation of regularity? How else to explain the necessity to obtain a second confession?

Improper influence by the County authorities having been shown to the satisfaction of the trial court, common sense would indicate an exceedingly strong presumption that such influence continued at least to the end of the same day, to the time of the second "confession".

POINT II

Without the confession improperly received in evidence, the State has woefully failed to make out a case.

The record is voluminous, the number of witnesses paraded before the jury was huge. Yet, when the evidence is examined, it is curious how little the State proved against this negro boy.

We must remember no one testified that he saw defendant shoot, dismember or burn Rogers. Indeed, there was a prison camp near the town of Fort Towson, Oklahoma, and at first the State suspected members thereof and arrested some (R. 179).

The crime was committed with a shot gun not belonging to defendant, but to one Sammie Green and with an axe belonging to the murdered man. No finger prints, foot prints or other evidence is presented linking the defendant with the crime. A very brief resumé of the testimony of each witness bears out the conviction that there is no proof of defendant's guilt other than the confession improperly admitted in evidence.

James Glenn Rogers, eight years old at the time of the trial (13 months after the murder) was sworn appar-

ently without any examination as to his ability to understand the nature of an oath (p. 15). He couldn't tell what kind of a looking person the murderer was (p. 17). He didn't know whether he was a white man or a black man (p. 17). He said, "Well, he blew the light out, and it sounded like he put on some clothes. He went out and set the side of the door afire, then I saw a black hand."

"Q. Saw a hand? A. A black hand, and then the house was—it was light enough, I could see them go out again. I got the baby and ran off." (R. 17)

Though the light was still burning when the assailant came in, the boy said, "But I didn't look? Yes, because I didn't look what color he was" (R. 18).

G. C. Campbell, who conducted the funeral testified that the lady's body was cut open on the left side, the ribs were split open, she was shot in front and the man's head was mashed in.

L. B. Mills testified that a few hours before the murder he saw defendant carrying something wrapped in a newspaper about a yard long. A little later he saw defendant again with a single barreled shot gun. It looked the same to him as State's Exhibit 3, but he didn't know. Sammie Green testified that about 3:30 that afternoon he saw defendant with his (Green's) gun wrapped in a newspaper. Two days later he traded defendant a little old pocket knife for three red gun shells. Mrs. W. A. Hall sold defendant on the day before the murder a quarter's worth of 12-gauge No. 4 Super-X or expert shells. Hosea Walker saw defendant with something wrapped in a newspaper, about two feet long. He couldn't imagine what it was. Richard Scott saw defendant with a newspaper 18

inches long. Lonzo Brown saw defendant with a shot gun wrapped in some paper. He didn't see it to know, but he thought it was a single barreled shot gun. He saw the end of the barrel protruding from the newspaper. Alton Ryder testified that they had some wildcat whiskey which a bunch of the boys disposed of in a few minutes. Defendant brought a gun there, "seems to me". Dr. F. L. Waters testified that there were 100 buckshot in the body. W. A. Hall testified that he didn't see the sale of the shot to defendant though he had sold him some shells 6 or 8 months before. Curtis Thompson saw defendant get a drink that morning. He had a "little package, brown or a newspaper one".

This virtually completes the testimony concerning the commission of the crime. Not one word of that testimony is inconsistent with defendant's story that he was hunting rabbits. The only one who allegedly saw the murderer, the young boy of 6 or 7, does not know what the man looked like, whether black or white. Merely fixing defendant near the scene of the crime proves nothing.

The credibility of the prosecution's witnesses, state and county officials for the most part, may be measured by the following instances. Others have been recited previously.

Jess Dunn, Warden of the Oklahoma State Penitentiary would have the court believe that when he questioned the prisoner, he knew nothing about the first confession. Nor had he heard that he had made a statement (R. 104). This is wholly unbelievable, especially when we remember that Van Raulston, one of those present at the first confession, accompanied the prisoner to the State Penitentiary and was present when the second confession was purported to have been made. The Warden would

not have begun questioning as soon as Lyons reached the Penitentiary if he did not know of the first confession, nor could he have asked all the questions he did if he didn't have the first confession to guide him. If the prisoner had given his own statement, it would not have been necessary to revise it and ask the same thing by question and answer.

Furthermore, the time when the confession was taken is left in grave doubt. The stenographer's minutes show 8:15 (R. 92). Dunn said first that the prisoner came at half past nine, (R. 91) and that it took 20 or 30 minutes for Lyons to tell his story (R. 92). Then the questioning began in front of his secretary (R. 92). Roy Marshall testified that, "It was 10 o'clock or after when we got there."

This much may be inferred. The Warden was interested that convicts at the prison camp under his supervision be removed from suspicion (R. 102). The newspapers condemned the Warden (R. 111). Lyon's conviction would remove that unfavorable publicity against the prison camp.

But the character of the State's evidence is best exemplified by the character of its chief witness, Cheatwood. The County Attorney on cross-examination, asked the defendant, "Isn't it true that Vernon Cheatwood had a strap of leather and was tapping you like that, and because you refused to answer questions they put to you?" (R. 55). Despite this admission Cheatwood glibly denied that he possessed a "negro-beater", a blackjack, or "anything that would be a piece of leather" (R. 178). He denied that he ever tapped defendant on his knees (R. 181).

These disinterested witnesses proved to the contrary: Albany Gipson, an employee of the ~~Webb Hotel~~ where Cheatwood registered at the time of his investigation of

this defendant, testified that Cheatwood said, "Boy, go up to my room and get me my nigger beater" (R. 256). Gipson went up and brought from Cheatwood's room the thing he called the "nigger beater" (R. 256). It was a blackjack, loaded, heavy on one end and shot in it (R. 256). He brought it back to Cheatwood at the head of the stairs and the latter stated, "this is what I beat the nigger boy's head with" (R. 257).

Leslie Skeen, the day clerk and bookkeeper of the Webb Hotel, testified that Cheatwood, during the investigation of the Rogers murder, told him he had lost his blackjack (R. 258). Cheatwood stated that he used the heavy end to hit them with and he used the other end to slap them with (R. 258). Skeen swore under oath that Cheatwood had asked him to forget what he said about the lost blackjack and further, "If I had had it the night before I would have got it out of him then" (R. 259). It would seem reasonable that these hotel employees would testify favorably to the state government's special investigator, yet that is their uncontradicted evidence.

Mrs. Vernon Colclasure, the sister-in-law of the murdered woman testified that Cheatwood came to the house, took a blackjack from his overcoat pocket, and said that he beat defendant, "from his knees down" (R. 260).

E. O. Colclasure testified that Cheatwood took a blackjack out of his overcoat pocket, "and bucked his right knee up and whammed it two or three times and said, 'I beat that boy last night for, I think, 6 or 7 hours'" (R. 262).

This testimony from the relatives of the murdered persons (certainly not in sympathy with the accused) stands uncontradicted and unchallenged in the record by anyone but Cheatwood. The entire case against the defendant may be measured by the testimony of Cheatwood. Obviously, the State officials were seeking to shield their fellow-officer.

Conclusion

This case presents a flagrant abuse of the fundamental rights of a person accused of crime. The entire evidence of the State is founded upon a second alleged confession made a few hours after a first confession, which was extorted from defendant under such circumstances that the trial court ruled the first confession out of the evidence.

This poor negro boy was convicted of murder on a record bare of any evidence against him except an alleged confession. In our opinion the case will always be recalled as the "pan of bones" case. This is a new method to pry a confession out of superstitious, illiterate, down-trodden humanity. That this youth was frightened out of his wits by the pan of bones may well be imagined. A new weapon has been added to the torture rack.

We submit and venture the hope that this Court will place its stamp of stern disapproval upon any such stratagem used by public officials to ensnare the ignorant and the helpless, and admonish them that their ingenuity would be better employed in devising legitimate methods for apprehending the guilty.

It is respectfully submitted that the judgment of conviction should be reversed.

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SUPREME COURT OF THE UNITED STATES.

No. 433.—OCTOBER TERM, 1943.

W. D. Lyons, Petitioner, } On Writ of Certiorari to the
vs. } Criminal Court of Appeals of
The State of Oklahoma. } the State of Oklahoma.

[June 5, 1944.]

Mr. Justice REED delivered the opinion of the Court.

This writ brings to this Court for review a conviction obtained with the aid of a confession which furnished, if voluntary, material evidence to support the conviction. As the questioned confession followed a previous confession which was given on the same day and which was admittedly involuntary,¹ the issue is the voluntary character of the second confession under the circumstances which existed at the time and place of its signature and, particularly, because of the alleged continued influence of the unlawful inducements which vitiated the prior confession.

The petitioner was convicted in the state district court of Choctaw County, Oklahoma, on an information charging him and another with the crime of murder. The jury fixed his punishment at life imprisonment. The conviction was affirmed by the Criminal Court of Appeals, 75 Okl. Cr. —, 138 P. 2d 142, rehearing 140 P. 2d 248, and this Court granted certiorari, 320 U. S. 732, upon the petitioner's representation that there had been admitted against him an involuntary confession procured under circumstances which made its use in evidence a violation of his rights under the due process clause of the Fourteenth Amendment.²

1. Whether or not the other evidence in the record is sufficient to justify the general verdict of guilty is not necessary to consider. The confession was introduced over defendant's objection. If such admission of this confession denied a constitutional right to defendant the error requires reversal. *Bram v. United States*, 168 U. S. 532, 540-42. Cf. *Stromberg v. California*, 283 U. S. 359, 367, 368; *Williams v. State of North Carolina*, 317 U. S. 287, 291, 292.

2 In petitioner's brief a claim is made that Oklahoma denied to him the equal protection of the laws guaranteed by the Fourteenth Amendment. Apparently petitioner relies upon his undue detention without preliminary examination, which was in violation of the state criminal procedure as a denial by Oklahoma of equal protection of the law. But the effect of the mere denial of a prompt examining trial is a matter of state, not of federal, law. To refuse this is not a denial of equal protection under the Fourteenth Amendment although it is a fact for consideration on an allegation that a confession used at the trial was coerced. Cf. *McNabb v. United States*, 318 U. S. 332, 340; *United States v. Mitchell*, Nos. 514-515, October Term 1943, decided April 24, 1944.

Prior to Sunday, December 31, 1939, Elmer Rogers lived with his wife and three small sons in a tenant house situated a short distance northwest of Fort Towson, Choctaw County, Oklahoma. Late in the evening of that day Mr. and Mrs. Rogers and a four year old son Elvie were murdered at their home and the house was burned to conceal the crime.

Suspicion was directed toward the petitioner Lyons and a confederate, Van Bizzell. On January 11, 1940, Lyons was arrested by a special policeman and another officer whose exact official status is not disclosed by the record. The first formal charge that appears is at Lyons' hearing before a magistrate on January 27, 1940. Immediately after his arrest there was an interrogation of about two hours at the jail. After he had been in jail eleven days he was again questioned, this time in the county prosecutor's office. This interrogation began about six-thirty in the evening, and on the following morning between two and four produced a confession. This questioning is the basis of the objection to the introduction as evidence of a second confession which was obtained later in the day at the state penitentiary at McAlester by Warden Jess Dunn and introduced in evidence at the trial. There was also a third confession, oral, which was admitted on the trial without objection by petitioner. This was given to a guard at the penitentiary two days after the second. Only the petitioner, police, prosecuting and penitentiary officials were present at any of these interrogations, except that a private citizen who drove the car that brought Lyons to McAlester witnessed this second confession.

Lyons is married and was twenty-one or two years of age at the time of the arrest. The extent of his education or his occupation does not appear. He signed the second confession. From the transcript of his evidence, there is no indication of a subnormal intelligence. He had served two terms in the penitentiary—one for chicken stealing and one for burglary. Apparently he lived with various relatives.

While petitioner was competently represented before and at the trial, counsel was not supplied him until after his preliminary examination, which was subsequent to the confessions. His wife and family visited him between his arrest and the first confession. There is testimony by Lyons of physical abuse by the police officers at the time of his arrest and first interrogation on January 11th. His sister visited him in jail shortly afterwards.

and testified as to marks of violence on his body and a blackened eye. Lyons says that this violence was accompanied by threats of further harm unless he confessed. This evidence was denied in toto by officers who were said to have participated.

Eleven days later the second interrogation occurred. Again the evidence of assault is conflicting. Eleven or twelve officials were in and out of the prosecutor's small office during the night. Lyons says that he again suffered assault. Denials of violence were made by all the participants accused by Lyons except the county attorney, his assistant, the jailer and a highway patrolman. Disinterested witnesses testified to statements by an investigator which tended to implicate that officer in the use of force, and the prosecutor in cross-examination used language which gave color to defendant's charge. It is not disputed that the inquiry continued until two-thirty in the morning before an oral confession was obtained and that a pan of the victims' bones was placed in Lyon's lap by his interrogators to bring about his confession. As the confession obtained at this time was not offered in evidence, the only bearing these events have here is their tendency to show that the later confession at McAlester was involuntary.

After the oral confession in the early morning hours of January 23, Lyons was taken to the scene of the crime and subjected to further questioning about the instruments which were used to commit the murders. He was returned to the jail about eight-thirty A.M. and left there until early afternoon. After that the prisoner was taken to a nearby town of Antlers, Oklahoma. Later in the day a deputy sheriff and a private citizen took the petitioner to the penitentiary. There, sometime between eight and eleven o'clock on that same evening, the petitioner signed the second confession.

When the confession which was given at the penitentiary was offered, objection was made on the ground that force was practiced to secure it and that even if no force was then practiced, the fear instilled by the prisoner's former treatment at Hugo on his first and second interrogations continued sufficiently coercive in its effect to require the rejection of the second confession.

The judge in accordance with Oklahoma practice and, after hearing evidence from the prosecution and the defense in the absence of the jury, first passed favorably upon its admissibility as a matter of law, *Lyons v. State*, 138 P. 2d 142, 163; cf. *McNabb v. United States*, 318 U. S. 332, 338, n. 5, and then, after witnesses

testified before the jury as to the voluntary character of the confession, submitted the guilt or innocence of the defendant to the jury under a full instruction, approved by the Criminal Court of Appeals, to the effect that voluntary confessions are admissible against the person making them but are to be "carefully scrutinized and received with great caution" by the jury and rejected if obtained by punishment, intimidation or threats. It was added that the mere fact that a confession was made in answer to inquiries "while under arrest or in custody" does not prevent consideration of the evidence if made "freely and voluntarily." The instruction did not specifically cover the defendant's contention, embodied in a requested instruction, that the second confession sprang from the fear engendered by the treatment he had received at Hugo.

The mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process. *Liscuba v. California*, 314 U. S. 219, 239-241; *Wan v. United States*, 266 U. S. 1, 14. The question of how specific an instruction in a state court must be upon the involuntary character of a confession is, as a matter of procedure or practice, solely for the courts of the state. When the state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary, as this instruction did, the requirements of due process, under the Fourteenth Amendment, are satisfied and this Court will not require a modification of local practice to meet views that it might have as to the advantages of concreteness. The instruction given satisfies the legal requirements of the State of Oklahoma as to the particularity with which issues must be presented to its juries, *Lyons v. State*, 138 P. 2d 142, 164, and in view of the scope of that instruction, it was sufficient to preclude any claim of violation of the Fourteenth Amendment.

The federal question presented is whether the second confession was given under such circumstances that its use as evidence at the trial constitutes a violation of the due process clause of the Fourteenth Amendment, which requires that state criminal proceedings "shall be consistent with the fundamental principles of liberty and justice." *Robert v. Louisiana*, 272 U. S. 312, 316; *Mooney v. Holohan*, 294 U. S. 103, 112; *Buchalter v. New York*, 319 U. S. 427, 429.

No formula to determine this question by its application to the facts of a given case can be devised. *Hopt v. Utah*, 110 U. S. 574.

583; *Betts v. Brady*, 316 U. S. 455, 462. Here improper methods were used to obtain a confession, but that confession was not used at the trial. Later, in another place and with different persons present, the accused again told the facts of the crime. Involuntary confessions, of course, may be given either simultaneously with or subsequently to unlawful pressures, force or threats. The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances. *Lisenba v. California*, 314 U. S. 219, 240. The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of "mental freedom" to confess to or deny a suspected participation in a crime. *Ashcraft v. State of Tennessee*, 321 U. S. —, No. 391, October Term 1943, decided May 1, 1944, slip opinion, p. 8; *Hysler v. Florida*, 315 U. S. 411, 413.

When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands. But where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses but the legal duty is upon them to make the decision. *Lisenba v. California, supra*, p. 238.

Review here deals with circumstances which require examination into the possibility as to whether the judge and jury in the trial court could reasonably conclude that the McAlester confession was voluntary. The fact that there is evidence which would justify a contrary conclusion is immaterial. To triers of fact is left the determination of the truth or error of the testimony of prisoner and official alike. It is beyond question that if the triers of fact accepted as true the evidence of the immediate events at McAlester, which were detailed by Warden Dunn and the other witnesses, the verdict would be that the confession was voluntary, so that the petitioner's case rests upon the theory that the McAlester confession was the unavoidable outgrowth of the events at Hugo.

The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at trial of his subsequent confessions under all possible circumstances. The admissibility of the later confession depends upon the same test—is it voluntary. Of course the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact and their conclusion, in such an uncertain situation, that the confession should be admitted as voluntary, cannot be a denial of due process. *Canty v. Alabama*, 309 U. S. 629, cannot be said to go further than to hold that the admission of confessions obtained by acts of oppression is sufficient to require a reversal of a state conviction by this Court. Our judgment there relied solely upon *Chambers v. Florida*, 309 U. S. 227. The Oklahoma Criminal Court of Appeals in the present case decided that the evidence would justify a determination that the effect of a prior coercion was dissipated before the second confession and we agree.

Petitioner suggests a presumption that earlier abuses render subsequent confessions involuntary unless there is clear and definite evidence to overcome the presumption. We need not analyze this contention further than to say that in this case there is evidence for the state which, if believed, would make it abundantly clear that the events at Hugo did not bring about the confession at McAlester.

In our view, the earlier events at Hugo do not lead unescapably to the conclusion that the later McAlester confession was brought about by the earlier mistreatments. The McAlester confession was separated from the early morning statement by a full twelve hours. It followed the prisoner's transfer from the control of the sheriff's force to that of the warden. One person who had been present during a part of the time while the Hugo interrogation was in progress was present at McAlester, it is true, but he was not among those charged with abusing Lyons during the questioning at Hugo. There was evidence from others present that Lyons readily confessed without any show of force or threats within a very short time of his surrender to Warden Dunn and

after being warned by Dunn that anything he might say would be used against him and that he should not "make a statement unless he voluntarily wanted to." Lyons, as a former inmate of the institution, was acquainted with the warden. The petitioner testified to nothing in the past that would indicate any reason for him to fear mistreatment there. The fact that Lyons, a few days later, frankly admitted the killings to a sergeant of the prison guard, a former acquaintance from his own locality, under circumstances free of coercion suggests strongly that the petitioner had concluded that it was wise to make a clean breast of his guilt and that his confession to Dunn was voluntary. The answers to the warden's questions, as transcribed by a prison stenographer, contain statements correcting and supplementing the questioner's information and do not appear to be mere supine attempts to give the desired response to leading questions.

The Fourteenth Amendment is a protection against criminal trials in state courts conducted in such a manner as amounts to a disregard of "that fundamental fairness essential to the very concept of justice," and in a way that "necessarily prevents a fair trial." *Lisenba v. California*, 314 U. S. 219, 236. A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt. The Fourteenth Amendment does not provide review of mere error in jury verdicts, even though the error concerns the voluntary character of a confession. We cannot say that an inference of guilt based in part upon Lyons' McAlester confession is so illogical and unreasonable as to deny the petitioner a fair trial.

Affirmed.

Mr. Justice DOUGLAS concurs in the result.

Mr. Justice RUTLEDGE dissents.

Mr. Justice MURPHY, dissenting.

This flagrant abuse by a state of the rights of an American citizen accused of murder ought not to be approved. The Fifth Amendment prohibits the federal government from convicting a defendant on evidence that he was compelled to give against himself. *Bram v. United States*, 168 U. S. 532. Decisions of this Court in effect have held that the Fourteenth Amendment makes this prohibition applicable to the states. *Chambers v.*

Florida, 309 U. S. 227; *Canty v. Alabama*, 309 U. S. 629; *Lisenba v. California*, 314 U. S. 219; *Ashcraft v. Tennessee*, No. 391, decided May 1, 1944. Cf. Green, "Liberty Under the Fourteenth Amendment," 27 Wash. Univ. L. Q. 497, 533. It is our duty to apply that constitutional prohibition in this case.

Even though approximately twelve hours intervened between the two confessions and even assuming that there was no violence surrounding the second confession, it is inconceivable under these circumstances that the second confession was free from the coercive atmosphere that admittedly impregnated the first one. The whole confession technique used here constituted one single, continuing transaction. To conclude that the brutality inflicted at the time of the first confession suddenly lost all of its effect in the short space of twelve hours is to close one's eyes to the realities of human nature. An individual does not that easily forget the type of torture that accompanied petitioner's previous refusal to confess, nor does a person like petitioner so quickly recover from the gruesome effects of having had a pan of human bones placed on his knees in order to force incriminating testimony from him. Cf. *State v. Ellis*, 294 Mo. 269; *Fisher v. State*, 145 Miss. 116; *Reason v. State*, 94 Miss. 290; *Whitley v. State*, 78 Miss. 255; *State v. Wood*, 122 La. 1014. Moreover, the trial judge refused petitioner's request that the jury be charged that the second confession was not free and voluntary if it was obtained while petitioner was still suffering from the inhuman treatment he had previously received. Thus it cannot be said that we are confronted with a finding by the trier of facts that the coercive effect of the prior brutality had completely worn off by the time the second confession was signed.

Presumably, therefore, this decision means that state officers are free to force a confession from an individual by ruthless methods, knowing full well that they dare not use such a confession at the trial, and then, as a part of the same continuing transaction and before the effects of the coercion can fairly be said to have completely worn off, procure another confession without any immediate violence being inflicted. The admission of such a tainted confession does not accord with the Fourteenth Amendment's command that a state shall not convict a defendant on evidence that he was compelled to give against himself. *Chambers v. Florida*, *supra*; *Canty v. Alabama*, *supra*; *Lisenba v. California*, *supra*; *Ashcraft v. Tennessee*, *supra*.

Mr. Justice BLACK concurs in this opinion.

